

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CENTRIPETAL NETWORKS, INC.,

Plaintiff,

v.

CISCO SYSTEMS, INC.,

Defendant.

CIVIL ACTION NO.
2:18cv94

TRANSCRIPT OF VIDEOCONFERENCE BENCH TRIAL PROCEEDINGS

Norfolk, Virginia
June 25, 2020

Volume 23
Pages 3428-3507

BEFORE: THE HONORABLE HENRY COKE MORGAN, JR.
United States District Judge

APPEARANCES:

KAUFMAN & CANOLES, P.C.

By: Stephen E. Noona

- and -

KRAMER LEVIN NAFTALIS & FRANKEL LLP

By: Paul J. Andre

Counsel for the Plaintiff

TROUTMAN SANDERS LLP

By: Dabney J. Carr, IV

- and -

DUANE MORRIS LLP

By: Louis N. Jameson

Counsel for the Defendant

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I N D E X

PLAINTIFF'S
WITNESS

PAGE

JAMES MALACKOWSKI
Direct Examination By Mr. Andre 3432

DEFENDANT'S
WITNESS

PAGE

STEPHEN BECKER
Direct Examination By Mr. Jameson 3439

E X H I B I T S

PLAINTIFF'S
NO.

PAGE

PTX-1248 3449

DEFENDANT'S
NO.

PAGE

DTX-1714 3446
DTX-1715 3447

1	(Proceedings commenced at 11:01 a.m.)	10:50:41
2	THE CLERK: Civil Action Number 2:18cv94, Plaintiff	11:01:33
3	Centripetal Networks, Inc. v. Defendant Cisco Systems, Inc.	11:01:38
4	For the Plaintiff, Mr. Noona, Mr. Andre, are you	11:01:41
5	ready to proceed?	11:01:45
6	MR. NOONA: We are, Your Honor.	11:01:48
7	THE CLERK: For Defendant, Mr. Carr, Mr. Jameson,	11:01:51
8	Mr. MacBride, are you ready to proceed?	11:01:56
9	MR. JAMESON: Yes, we are, Your Honor.	11:01:59
10	THE COURT: All right, counsel, I suppose the first	11:02:00
11	question is do you want to call on -- do either of you want	11:02:02
12	to call on your expert witnesses to comment on the new data	11:02:11
13	that's been submitted to the Court?	11:02:15
14	MR. ANDRE: Your Honor, your video is not on. Your	11:02:17
15	audio is on, but your camera is not on.	11:02:26
16	There you are. We've got you now.	11:02:32
17	THE COURT: Okay. Well, you heard the question. Do	11:02:35
18	you wish to -- either one of you wish to call your damages	11:02:40
19	experts to comment on the effect of the new data on their	11:02:49
20	opinions, or no? Or do you want to proceed with argument on	11:02:56
21	damages, and if the Court has any questions for the experts,	11:03:00
22	I'll ask them?	11:03:06
23	MR. ANDRE: Your Honor, this is Paul Andre, for	11:03:08
24	Plaintiff Centripetal.	11:03:11
25	If it would help the Court, we'd be glad to put	11:03:12

1 Mr. Malackowski on to talk about the new data. As we 11:03:15
2 informed the Court, Mr. Gunderson's daughter is getting 11:03:19
3 married this weekend, so he has wedding plans. And 11:03:22
4 Mr. Malackowski is available. 11:03:25

5 We've submitted our findings on Thursday based on 11:03:30
6 the information that was provided. There was subsequent 11:03:33
7 information provided which we did not update the Court on 11:03:36
8 yet. If you'd like to hear about that, we'd be glad to do 11:03:40
9 so, if you find it would be helpful. 11:03:46

10 THE COURT: Well, it's up to counsel as to whether 11:03:50
11 you'd like to call him or not. 11:03:52

12 MR. ANDRE: Your Honor, I just have a very short 11:03:54
13 discussion about that data, if that's okay with you; the 11:03:58
14 plaintiff would like to do so. 11:04:01

15 THE COURT: How long do you think that's going to 11:04:07
16 take? 11:04:10

17 MR. ANDRE: 10 to 15 minutes from Centripetal, Your 11:04:11
18 Honor. 11:04:13

19 THE COURT: All right. Well, what about the 11:04:14
20 defense? 11:04:16

21 MR. JAMESON: Your Honor, this is Woody Jameson. I 11:04:17
22 would like to have the opportunity for Dr. Becker to comment 11:04:21
23 on the information he provided. 11:04:24

24 THE COURT: How much time do you think you need? 11:04:25

25 MR. JAMESON: I think 10 to 15 minutes, for him to 11:04:28

Malackowski, J. - Direct

1 explain some of the issues, would be plenty. 11:04:31

2 THE COURT: All right. Well, I'll grant each side 11:04:34
3 15 minutes to have their experts testify; plaintiff first. 11:04:39

4 MR. ANDRE: Thank you, Your Honor. 11:04:45

5 If I can get Mr. Malackowski to turn his camera on. 11:04:47

6 (Witness sworn.) 11:04:53

7 MR. ANDRE: May I proceed? 11:05:11

8 THE COURT: You may proceed. 11:05:13

9 JAMES MALACKOWSKI, called by the Plaintiff, having 11:05:13
10 been first duly sworn, was examined and testified as follows: 11:05:13

11 DIRECT EXAMINATION 11:05:14

12 BY MR. ANDRE: 11:05:14

13 Q. Mr. Malackowski, I want to go to our slide deck. 11:05:15

14 MR. ANDRE: And, Your Honor, we've provided a slide 11:05:18
15 deck to you, and we'll start on slide 4. 11:05:21

16 THE COURT: This is in the smaller binder, I think. 11:05:28

17 MR. ANDRE: That's correct. 11:05:33

18 THE COURT: Okay. 11:05:33

19 BY MR. ANDRE: 11:05:34

20 Q. So in slide 4, Mr. Malackowski, could you describe 11:05:36
21 what -- when we received the data from Cisco, what was the 11:05:43
22 predecessor products early on and how it changed? 11:05:46

23 A. Yes, sir. 11:05:50

24 Your Honor, the focus of our update was to look at 11:05:52
25 predecessor products to the accused products. On June 18th, 11:05:55

—Malackowski, J. - Direct—

1	we received an update from Cisco that contained the list of	11:05:59
2	predecessor products shown on the left half of the screen.	11:06:03
3	In the three columns of data, you can see each of the product	11:06:06
4	numbers. Approximately 24 hours later, on June 19th, we	11:06:10
5	received an updated set of information that contained fewer	11:06:14
6	product numbers but, as we will see, significantly greater	11:06:19
7	sales described as predecessor products.	11:06:24
8	Q. If we go to the next slide, slide 5, does that describe	11:06:27
9	the sales that you're talking about?	11:06:30
10	A. It does. Your Honor, the blue bars show, for each fiscal	11:06:33
11	year, the data that was presented by Cisco on June 18th. In	11:06:36
12	comparison, you can see the green bars are the updated	11:06:42
13	information; fewer products but obviously the value of the	11:06:46
14	green bars is greater, especially in fiscal year 2017 and	11:06:50
15	2018.	11:06:56
16	MR. ANDRE: Mr. Jameson, Woody, could you mute your	11:07:01
17	line. We're getting some feedback. We think it might be	11:07:02
18	from that. Thank you.	11:07:05
19	BY MR. ANDRE:	11:07:05
20	Q. Let's go to the original data that was submitted on	11:07:07
21	June 18th, the next slide, slide 6, and describe what we're	11:07:10
22	looking at here.	11:07:15
23	A. Yes. My original task was to look at the predecessor	11:07:16
24	switches in comparison to the accused switches. Obviously, I	11:07:20
25	do this for all the product categories, but this was the	11:07:24

—Malackowski, J. - Direct—

1 original data as I saw it on the 18th. And I was very 11:07:28
2 focused on, first, annual information, and then I went into 11:07:32
3 more detail. 11:07:37

4 Q. In that fiscal year '18, where there were roughly almost 11:07:38
5 equal sales of the predecessor product and the new Catalyst 11:07:42
6 switches, was that the transition year when Catalyst was 11:07:47
7 released? 11:07:51

8 A. It was, yes, sir. 11:07:52

9 THE COURT: Fiscal year '18 ends in, what, July 1st 11:07:53
10 of '18? Or '19? 11:07:57

11 THE WITNESS: Fiscal year '18 would end in July of 11:08:00
12 '19, Your Honor. 11:08:06

13 THE COURT: Okay. 11:08:13

14 BY MR. ANDRE: 11:08:18

15 Q. So if we go to the next slide -- and describe to the 11:08:19
16 Court what we're looking at here based on the first set of 11:08:22
17 information that was sent to us. 11:08:26

18 A. It's my understanding the Court requested to see this 11:08:29
19 data monthly, so slide 7 simply breaks the data received into 11:08:34
20 a monthly basis showing the predecessor switches in red and 11:08:38
21 then, on a monthly basis, the accused 9000 switches in blue. 11:08:41
22 And, again, this was all using the original dataset. 11:08:46

23 Q. And then based on the update after we filed our 11:08:49
24 submission last Thursday, could you go through the same 11:08:53
25 analysis and go to the next slide and describe what we saw 11:08:56

—Malackowski, J. - Direct—

1 here.

11:08:59

2 A. So at direction of counsel, I then changed my work to

11:09:00

3 focus on the updated Cisco information, again starting with

11:09:03

4 the annual data. So, Your Honor, this shows the updated

11:09:07

5 information for predecessor switches versus accused switches

11:09:10

6 by fiscal year, and then, again, I also detailed the data

11:09:14

7 monthly. That would be the next slide.

11:09:21

8 Q. And the average predecessor revenue, that red line, what

11:09:23

9 is that referring to?

11:09:27

10 A. My understanding is the Court had interest in

11:09:28

11 understanding the rate of growth, or increase, in the accused

11:09:31

12 products above the predecessor products, essentially looking

11:09:36

13 to the predecessor switches as a baseline and understanding

11:09:39

14 its sales improved on the baseline, perhaps associated with

11:09:43

15 the technology that's at issue in this case.

11:09:47

16 Q. If we go to the next slide, could you tell the Court

11:09:49

17 what -- this is a monthly breakdown?

11:09:54

18 A. Yes. In my opinion, consistent with the Court's request,

11:09:56

19 it is important to look at this information monthly. And so,

11:10:00

20 Your Honor, in some respects this is the most important

11:10:04

21 chart.

11:10:07

22 It shows, on a monthly basis, the updated

11:10:07

23 predecessor revenue for the 3000 series switches as compared

11:10:11

24 to the accused data for the 9000 series switches, and I did a

11:10:17

25 calculation showing the monthly average for the predecessor

11:10:22

—Malackowski, J. - Direct—

1 prior to infringement. That represents the red line. 11:10:26

2 So if you calculate the average of the predecessor 11:10:30

3 3000 switches, draw that line across the page, then 11:10:33

4 everything above that line in blue represents the increase of 11:10:38

5 the accused switches over the predecessor baseline. It was 11:10:44

6 my understanding -- 11:10:49

7 THE COURT: Now, what did you base the predecessor 11:10:51

8 baseline on? The sales prior to fiscal year 2019? 11:10:53

9 THE WITNESS: Prior to the first accused 11:11:00

10 infringement for these products, Your Honor. 11:11:02

11 THE COURT: Which would be in October of '17. Well, 11:11:04

12 the date was June of '17, but we don't have a monthly -- 11:11:22

13 THE WITNESS: We took the first accused data as the 11:11:36

14 starting point for the monthly revenue. So you can see 11:11:41

15 accused data would be August '17, that small blue bar at the 11:11:44

16 very bottom. 11:11:49

17 THE COURT: That was the first sale of the accused 11:11:51

18 data? 11:11:53

19 THE WITNESS: Yes, sir. 11:11:53

20 THE COURT: All right. Well, what was the 11:12:01

21 difference between the data submitted on the 18th and the 11:12:03

22 data submitted on the 19th? 11:12:09

23 THE WITNESS: So the overall difference in data can 11:12:11

24 be shown in the first set of bar charts, but if you look at 11:12:16

25 the difference in the accused products versus the predecessor 11:12:22

—Malackowski, J. - Direct—

1 products for the switches, it's about a 40 percent increase 11:12:25
2 for the switches, 40.9 percent increase over the predecessor 11:12:28
3 baseline. 11:12:34

4 THE COURT: All right. 11:12:38

5 THE WITNESS: And so, Your Honor, I essentially 11:12:40
6 repeated this accounting analysis for each of the accused 11:12:44
7 product categories, and if counsel flips through the charts, 11:12:47
8 you'll see this at a detail level for each category. 11:12:49

9 So here we're starting by looking at Aggregation 11:12:52
10 Services Routers, first on an annual basis; next slide, we 11:12:57
11 looked at the Integration Services Routers, or the ISRs, on 11:13:00
12 an annual basis; and then next slide, Your Honor, I looked at 11:13:05
13 the routers together on a monthly basis, and here, again, you 11:13:08
14 can see the red predecessor sales as compared to the blue 11:13:12
15 accused sales. 11:13:17

16 I calculated the average sales for the predecessor 11:13:19
17 products; I set that as the baseline; and then I calculated 11:13:23
18 everything that was above the baseline for the accused sales 11:13:28
19 to show you the rate of growth. 11:13:30

20 THE COURT: All right. 11:13:33

21 THE WITNESS: If we go to the next product category, 11:13:35
22 this is the Firepower adaptive security, first starting on an 11:13:37
23 annual basis. We can see the transition in fiscal year 2018. 11:13:42
24 Next, we can look at that data on a monthly basis; same 11:13:46
25 analysis, calculate the baseline based upon the predecessor 11:13:50

—Malackowski, J. - Direct—

1 data, mark that baseline as a red horizontal line, and 11:13:54
2 determine the increase in sales on a monthly basis above the 11:13:59
3 line. 11:14:03

4 Next category is the Stealthwatch revenue, again, 11:14:04
5 beginning annually; next chart, looking at it monthly, 11:14:09
6 drawing the average for the predecessor, creating the 11:14:15
7 horizontal red line, calculating everything above the line. 11:14:19

8 Next chart, the Firepower Management Center, or FMC, 11:14:25
9 revenue, again, starting with the annual data; next chart 11:14:32
10 digging into the monthly data, determining the average 11:14:36
11 monthly predecessor data, drawing the red line, calculating 11:14:41
12 what was above the red line. In this case, the amount above 11:14:45
13 the red line is fairly modest. 11:14:49

14 The next chart, ISE, Identity Services Revenue, same 11:14:52
15 analysis, starting with annual data; next chart, looking to 11:14:59
16 monthly data, calculating the predecessor average, drawing 11:15:03
17 the red line, determining the overage and the next -- 11:15:07

18 BY MR. ANDRE: 11:15:16

19 Q. By the way, this is the last slide, yes. 11:15:16

20 A. Finally, looking at the last slide, which is the accused 11:15:18
21 Digital Network Architecture, I understand there was no 11:15:23
22 predecessor product, and so I was then able to summarize for 11:15:26
23 each product category what were the sales that were above the 11:15:30
24 predecessor baseline. 11:15:35

25 MR. ANDRE: Your Honor, that's the extent of our 11:15:37

Becker, S. - Direct

1	presentation for Mr. Malackowski.	11:15:41
2	THE COURT: Okay.	11:15:44
3	MR. ANDRE: If you have any questions? Or we'll	11:15:46
4	turn it over to the other side, otherwise.	11:15:48
5	THE COURT: Let me hear from the other side.	11:15:51
6	MR. JAMESON: Dr. Becker, is your camera on?	11:15:56
7	DR. BECKER: Can you hear and see me?	11:16:05
8	THE COURT: Yes.	11:16:07
9	MR. JAMESON: Do we need to swear in Dr. Becker	11:16:19
10	again?	11:16:21
11	THE COURT: Yes.	11:16:30
12	(Witness sworn.)	11:16:31
13	STEPHEN BECKER, called by the Defendant, having been	11:16:31
14	first duly sworn, was examined and testified as follows:	11:16:31
15	DIRECT EXAMINATION	11:16:48
16	BY MR. JAMESON:	11:16:48
17	Q. Good morning, Dr. Becker.	11:16:49
18	A. Good morning.	11:16:51
19	Q. Can you explain to the Court the additional data that was	11:16:51
20	found between June 18th and June 19th?	11:16:55
21	A. Yes, I can.	11:16:59
22	Just in advance of June 18th, when we were compiling	11:17:04
23	the materials for the Court based on what were, I think,	11:17:08
24	millions and millions of records of predecessor data that	11:17:13
25	Cisco pulled, when it got pulled together, I noticed on --	11:17:18

Becker, S. - Direct

1 late on the 17th, early on the 18th, and as indicated in my 11:17:26
2 declaration, that sales data for the Catalyst 3000 -- well, 11:17:29
3 specifically, the 3850 model and the Catalyst 4500 series 11:17:37
4 were not in the data. I don't know why it wasn't in the 11:17:43
5 data, but it was clear that it was not in the data. 11:17:47

6 I have indicated this in this missing data in the 11:17:51
7 declaration and in the materials that we supplied. Cisco 11:17:57
8 scrambled and got that additional data to us, and the 11:18:03
9 submission on the 19th provided an update that included that 11:18:06
10 Cisco 3850 series and 4500 series Catalyst switch data. 11:18:11

11 That is the primary sort of addition, was to fill in 11:18:18
12 that one hole that existed in the data that we noticed on the 11:18:23
13 18th. 11:18:26

14 THE COURT: Where is that declaration? Is that an 11:18:27
15 exhibit, or what? Counsel? 11:18:30

16 MR. JAMESON: Your Honor, it was filed with the 11:18:35
17 Court as a pleading. 11:18:37

18 THE COURT: Okay. It's not in either of the books 11:18:39
19 that I have. That's why I'm asking. 11:18:46

20 MR. JAMESON: That's right, Your Honor. It was a 11:18:48
21 pleading, and I'm trying to get the pleading number as we 11:18:51
22 speak. 11:18:54

23 THE COURT: All right. I've got it. Just a second. 11:18:54
24 Okay. I think there's also data, on the 6000 series 11:20:12
25 in the data supplied by Cisco, which was footnoted. Is that 11:20:22

Becker, S. - Direct

1 right? I'm asking the witness. 11:20:31

2 THE WITNESS: Sorry, could you ask that again. It 11:20:37
3 was -- 11:20:39

4 THE COURT: The 6000 series was also included in the 11:20:40
5 data supplied by Cisco. 11:20:45

6 THE WITNESS: Yes. So that's the 6000 series. 11:20:48
7 There are three major product series that are predecessors to 11:20:52
8 the accused Catalyst switch models; the 3000 series, the 4000 11:20:59
9 series, and the 6000 series. And the 6000 was in the prior 11:21:05
10 data, and some of the 3000 series, and that's what then got 11:21:14
11 updated. 11:21:17

12 THE COURT: Okay. All right. You may proceed. 11:21:20

13 BY MR. JAMESON: 11:21:20

14 Q. And, Dr. Becker, was there daylight between you and 11:21:26
15 Mr. Malackowski with respect to what constituted the 11:21:32
16 predecessor products to the 9000 series one? 11:21:35

17 A. Yes. There's substantial -- there's a substantial 11:21:40
18 difference. Set aside this question of the update between 11:21:46
19 June 18th and June 19th, the slides that Mr. Malackowski just 11:21:49
20 presented, which have the updated data in them, are 11:21:57
21 comparisons that only treat the Cisco 3000 series switches as 11:22:02
22 predecessors to the Catalyst accused 9000 series switches, 11:22:09
23 and that is just -- frankly, it's inconsistent with the facts 11:22:14
24 and, I think, creates a very significant difference in the 11:22:18
25 picture that is painted with respect to the sales of the 11:22:23

Becker, S. - Direct

1 predecessor switches versus the accused switches. 11:22:27

2 Q. Do you have an understanding as to what are the 11:22:34
3 predecessor products to the Catalyst 9400 series switches? 11:22:38

4 A. Yes. So the predecessors to the Catalyst 9400 series 11:22:41
5 switches are the Catalyst 4500 series and the 6500 series. 11:22:51

6 Q. So you included those in your calculation? 11:23:00

7 A. Yes. 11:23:03

8 Q. And with respect to the Catalyst 9500 series, do you have 11:23:04
9 an understanding as to what the predecessor products to that 11:23:13
10 series are? 11:23:16

11 A. Yes. The Catalyst 9500 series switches were preceded by 11:23:17
12 the 4500 series and the 3850 series as the most direct 11:23:27
13 predecessors, although we see it's clear in the Cisco data 11:23:34
14 that there were significant sales of many different types of 11:23:39
15 switches, but the ones that most closely match and are listed 11:23:45
16 in the Cisco materials as the direct sort of upgrade path for 11:23:51
17 the 9500 series is the 4500 and 3850. 11:23:58

18 THE COURT: All right. Now, you're saying that the 11:24:05
19 4500 series and the 3850 series were the predecessor of the 11:24:09
20 9500 series, right? 11:24:14

21 THE WITNESS: Yes, Your Honor. 11:24:18

22 THE COURT: And you're saying that the 3000 series, 11:24:20
23 the 4500 series, and the 6500 series were predecessors to the 11:24:25
24 9000 series? 11:24:36

25 THE WITNESS: So the -- 11:24:37

Becker, S. - Direct

1 THE COURT: Yes or no? That's what I've written 11:24:40
2 down that you just said. 11:24:44

3 THE WITNESS: The 6500 series, the 6000 series is a 11:24:46
4 predecessor for the 9400. 11:24:51

5 THE COURT: The 6000 series? 11:24:55

6 THE WITNESS: Well, when I say "6000," I mean 11:24:58
7 specifically the model -- the primary model in there is the 11:25:01
8 6500. 11:25:05

9 MR. JAMESON: And, Your Honor, if it would be 11:25:08
10 helpful, I can pull up some documents -- 11:25:10

11 THE COURT: Well, now, wait a minute. Let me ask 11:25:13
12 the witness a question. 11:25:14

13 Are you saying that the 3000 series, the 4500 11:25:17
14 series, and the 6500 series were all predecessors of the 9400 11:25:21
15 series? Are you saying that? 11:25:32

16 THE WITNESS: No. 11:25:33

17 THE COURT: What are you saying? Only the 6500? 11:25:35

18 THE WITNESS: With respect to the Catalyst 9400 11:25:38
19 series accused switches, the predecessors are the 4500 series 11:25:43
20 and 6500 series. 11:25:50

21 THE COURT: So no 3000? 11:25:57

22 THE WITNESS: No. No, Your Honor, not with respect 11:25:59
23 to the 9400. 11:26:03

24 THE COURT: Okay. But the 4500 and the 3850, you 11:26:05
25 said, were the predecessors to the 9500 series? 11:26:12

Becker, S. - Direct

1 THE WITNESS: Yes, Your Honor. 11:26:16

2 THE COURT: All right. 11:26:18

3 MR. JAMESON: And, Your Honor, if it would be 11:26:20
4 helpful, we could show you three documents that will provide 11:26:21
5 a pretty good picture of this for you. 11:26:26

6 THE COURT: It's up to you what you show me. 11:26:30

7 MR. JAMESON: Let's pull up -- and, Your Honor, this 11:26:33
8 is a new exhibit that we're asking to show you in light of 11:26:36
9 kind of the request that you made for this information. 11:26:40

10 It would be -- Mr. Simons, if you can pull up what 11:26:44
11 we've marked as Defendant's Trial Exhibit 1714. That should 11:26:48
12 be in your book. 11:26:56

13 THE COURT: I've got two books. Let's see here. Is 11:26:59
14 it in the book "Schedules to the declaration"? 11:27:03

15 MR. JAMESON: "Additional materials for damages 11:27:09
16 hearing." 11:27:12

17 THE COURT: And what was that number? 11:27:18

18 MR. JAMESON: It's Defense Exhibit 1714. 11:27:22

19 MR. ANDRE: Your Honor, we don't have this exhibit. 11:27:27
20 This was not an exhibit that was disclosed in the case or on 11:27:29
21 the exhibit list, so we don't have this document. 11:27:33

22 MR. JAMESON: Mr. Andre, it's been sent to you. 11:27:36

23 MR. ANDRE: Was this document produced in this 11:27:41
24 litigation? 11:27:43

25 THE COURT: No. They just said it's a new exhibit, 11:27:43

Becker, S. - Direct

1 but they said they sent it to you. 11:27:46

2 BY MR. JAMESON: 11:27:55

3 Q. Dr. Becker, if you would -- could you turn to the second 11:27:56
4 page of this exhibit, the DTX-1714, and just explain to the 11:28:00
5 Court what this shows. 11:28:06

6 A. This document is a Catalyst 9400 series piece of 11:28:10
7 literature that describes the upgrade path from prior 11:28:19
8 generation Catalyst switches to the 9400 series, and you'll 11:28:24
9 see at the top there where it says, "Previous modular access 11:28:29
10 switches," it's listing the Catalyst 4500 and Catalyst 6500 11:28:34
11 as the previous modular access switches that they are then 11:28:41
12 saying, if you want to buy the latest access switch, you buy 11:28:46
13 the 9400, which is that right-most column. 11:28:51

14 And they're identifying the features of the latest 11:28:58
15 access switch series -- namely, the 9400 -- that are being 11:29:04
16 provided as sort of upgrades and differences with the two 11:29:09
17 prior modular switch models. 11:29:14

18 THE COURT: All right. If this exhibit is 11:29:24
19 introduced, it will be introduced only for the purpose of 11:29:31
20 consideration of damages. 11:29:35

21 MR. JAMESON: And, Your Honor, we would ask that 11:29:37
22 this be moved into evidence for that purpose. 11:29:39

23 MR. ANDRE: Your Honor, I'd like to object. It 11:29:51
24 wasn't on the exhibit list, and I don't think it was produced 11:29:52
25 in the litigation to us, even if it's not on the exhibit 11:29:55

Becker, S. - Direct

1 list. We've never seen this document. 11:29:59

2 MR. JAMESON: Your Honor, this is a document that's 11:30:02
3 publicly available on Cisco's website that became relevant in 11:30:04
4 light of the request by the Court for this information. 11:30:08

5 THE COURT: As I say, the Court will consider it on 11:30:17
6 the issue of damages only. 11:30:21

7 (Defense Exhibit DTX-1714 was received in evidence.) 11:30:25

8 MR. JAMESON: Thank you, Your Honor. 11:30:25

9 Mr. Simons, can we pull up DTX-1715. 11:30:28

10 BY MR. JAMESON: 11:30:33

11 Q. And, Dr. Becker -- 11:30:34

12 Mr. Simons -- well, first of all, what does this 11:30:37
13 show, Dr. Becker? 11:30:40

14 A. This is the upgrade document for the 9500 series switch 11:30:41
15 family. 11:30:47

16 Q. And if we could turn to the next page, Mr. Simons. 11:30:47

17 Can you explain what this shows, Dr. Becker? 11:30:52

18 A. Yes. This is providing essentially the same table that 11:30:55
19 we looked at on the prior document. You can see on the 11:30:58
20 right-hand column it's called the "Latest fixed core switch." 11:31:03
21 That's the Catalyst 9500 series. And they identified two 11:31:07
22 prior switch models as the, quote, previous fixed core 11:31:12
23 switches; the 4500 series and the 3850 series. 11:31:17

24 MR. JAMESON: And, Your Honor, we would -- 11:31:28

25 THE COURT: It appears this is on the Cisco website? 11:31:29

—Becker, S. - Direct—

1	MR. JAMESON: Yes, Your Honor.	11:31:34
2	THE WITNESS: Yes. It's the Cisco public website.	11:31:36
3	THE COURT: Okay. It will be admitted for purposes	11:31:40
4	of damages only.	11:31:44
5	(Defense Exhibit DTX-1715 was received in evidence.)	11:31:46
6	MR. JAMESON: Thank you, Your Honor.	11:31:46
7	And then, finally, we would like to go to PTX-1248,	11:31:47
8	Mr. Simons.	11:31:51
9	BY MR. JAMESON:	11:31:55
10	Q. And, Dr. Becker, what is this document showing?	11:31:57
11	A. So this is the upgrade document for the Catalyst 9300	11:32:00
12	series switches.	11:32:06
13	Q. And if --	11:32:07
14	THE COURT: I don't have 1248, in the same book at	11:32:10
15	least. Is it in the other book?	11:32:26
16	MR. JAMESON: Your Honor, it should have been in	11:32:28
17	there, in the same book. It should have been right after the	11:32:30
18	last two documents. This exhibit actually was -- portions of	11:32:32
19	this exhibit were previously admitted in this trial.	11:32:38
20	THE COURT: I'm sorry. You've got it out of order.	11:32:44
21	I assumed it came before 17, but it doesn't. I've got it.	11:32:46
22	BY MR. JAMESON:	11:32:51
23	Q. And, Dr. Becker, if we could go to the second page of	11:32:52
24	this PTX-1248, which is Bates 266, and if you could explain	11:32:55
25	what this is showing.	11:33:00

Becker, S. - Direct

1 A. Yes. So this, again, on the right-most column, it lists 11:33:02
2 the Catalyst 9300 series, and then there are three columns to 11:33:06
3 the left of that, what they call "Installed-base access 11:33:12
4 switches." You call your installed-base the thing that is 11:33:18
5 essentially already out there, and we see the 3560, 3750, 11:33:22
6 3750G, and the 3850 series are identified as the primary 11:33:29
7 models that people would be upgrading from into a 9300 series 11:33:37
8 Catalyst switch. 11:33:42

9 MR. JAMESON: And, Your Honor, we would ask that 11:33:47
10 this be moved into evidence for the same limited purpose. 11:33:48

11 THE COURT: In the damages material that Cisco 11:33:51
12 supplied, Dr. Becker, does it say that -- or is it 11:33:57
13 Mr. Becker? Are the sales for 9300, 9400 and 9500 all listed 11:34:02
14 under the 9000 series, or are they listed separately? 11:34:15

15 THE WITNESS: They are -- in my materials, they are 11:34:20
16 listed as the accused 9000 series, and when you see a line in 11:34:23
17 my materials that says "Accused 9000 series," I'm referring 11:34:32
18 to the 9300, 9400, and 9500 series. 11:34:36

19 THE COURT: All right. So we don't have separate 11:34:41
20 figures for the three of those? 11:34:43

21 THE WITNESS: I don't know whether, in the details 11:34:46
22 that we provided, it has that breakout. 11:34:52

23 Actually, in the materials that I submitted, there 11:34:58
24 is a schedule called Schedule 1.1, and it does provide a 11:35:02
25 breakout of 9300, 9400, and 9500. 11:35:10

—Becker, S. - Direct—

1 THE COURT: Well, you just said it didn't. 11:35:19

2 THE WITNESS: Well, the summary schedules -- the 11:35:20
3 annual summaries that I provided roll everything up, but then 11:35:24
4 there is a subsidiary schedule that is one of the pages in 11:35:28
5 the -- I think it's about 70 pages of materials that I 11:35:32
6 provided do have the breakout of these models down at the 11:35:35
7 individual model level. 11:35:43

8 THE COURT: All right. 11:35:45

9 (Plaintiff Exhibit PTX-1248 was received in 11:35:45
10 evidence.) 11:35:45

11 BY MR. JAMESON: 11:35:45

12 Q. Dr. Becker, are there any areas of disagreement you care 11:35:51
13 to comment between what you submitted to the Court and what 11:35:56
14 Mr. Malackowski submitted to the Court? 11:36:00

15 A. Yes. I think if we -- if it's possible to go to the 11:36:02
16 materials that I submitted, I could identify one significant 11:36:09
17 difference. 11:36:17

18 Q. Direct us where you would like to go, Dr. Becker, and we 11:36:20
19 can pull it up. 11:36:22

20 A. Okay. In the materials that I submitted on June the 19th 11:36:24
21 that include the missing 3850 and 4500 series data, the front 11:36:30
22 group of pages, if we go to the very first page, it's a 11:36:41
23 schedule that is the '856 patent summary. 11:36:45

24 Q. Do you want to do that on the U.S. basis or worldwide 11:36:52
25 basis? 11:36:57

Becker, S. - Direct

1 A. Well, if we want to be apples to apples with what 11:36:57
2 Mr. Malackowski presented, I would say go to the sixth page 11:37:02
3 into this set, and this is on a worldwide basis. 11:37:05

4 What you can see, the Catalyst switch data is where 11:37:11
5 Mr. Malackowski and I have a difference. I think with 11:37:17
6 respect to the other categories, there would not be any, as 11:37:20
7 you say, daylight between Mr. Malackowski's presentation and 11:37:25
8 mine, but with respect to Catalyst switches, you'll see that 11:37:29
9 the predecessor Catalyst switch models listed for fiscal 2017 11:37:33
10 is \$4.876 billion. 11:37:39

11 So the 12 months -- kind of completely clean 12 11:37:44
12 months prior to the introduction of the accused Catalyst 11:37:49
13 models, those Catalyst 3000 series, 4500 series, and 6500 11:37:53
14 series total just under \$5 billion, \$4.9 billion of sales. 11:38:01
15 And you can see in the next column, in fiscal 2018, it 11:38:09
16 actually sold 5 billion of those models. 11:38:12

17 And then if you look at the accused Catalyst 9000 11:38:15
18 series line, you'll see that those accused Catalyst models, 11:38:20
19 of course, the first year that they were sold is a partial 11:38:26
20 year, so it's only \$817 million in the half of the year that 11:38:30
21 they were -- that they're accused, but if we go to fiscal 11:38:35
22 2019, you can see it's 5.2 billion, and then in fiscal 2020, 11:38:40
23 it's 4.8 billion. 11:38:46

24 So the stark difference that Mr. Malackowski showed 11:38:49
25 us on his slide 8 suggested that there was a very significant 11:38:54

—Becker, S. - Direct—

1 difference, but Mr. Malackowski's bar chart only includes the 11:39:02
2 3000 series switches. It does not include the 4500 or 6500 11:39:06
3 series, which were, as we saw, predecessors to the accused 11:39:13
4 models. 11:39:19

5 THE COURT: All right. Well, you're saying that 11:39:22
6 this chart is correct and his isn't. 11:39:25

7 THE WITNESS: Yes, sir. I'm saying that his 11:39:28
8 excludes two models that sold close to -- oh, I think it's 11:39:32
9 over \$2 billion worth of sales, and they are clearly 11:39:39
10 predecessors to the accused models, and he doesn't have any 11:39:43
11 revenue associated with those in any of the charts that he 11:39:47
12 presented. 11:39:51

13 THE COURT: But this chart does include it? 11:39:51

14 THE WITNESS: Yes, Your Honor, it does. This chart 11:39:54
15 does include it, and the monthly schedules that are provided 11:39:56
16 behind this do include it. 11:40:00

17 THE COURT: All right. 11:40:08

18 BY MR. JAMESON: 11:40:16

19 Q. Dr. Becker, with respect to the sale of the DNA Center 11:40:16
20 products, did your calculations include a predecessor 11:40:20
21 product? 11:40:24

22 A. With respect to the DNA Center, it does include a 11:40:24
23 predecessor. There were predecessor models to the DNA, the 11:40:35
24 accused model. Mr. Malackowski shows the DNA Center 11:40:41
25 appliance just showing up at the date of its introduction, 11:40:46

—Becker, S. - Direct—

1 and there was a predecessor model for that. 11:40:55

2 Q. And, Mr. Simons, if we can go back to the '856 patent 11:40:57
3 slide -- 11:41:11

4 THE COURT: Where would you find -- did you chart 11:41:12
5 the predecessor to the DNA like that chart you just showed 11:41:13
6 us? 11:41:18

7 THE WITNESS: Yes. That would be shown on the -- 11:41:19
8 for example, the '205 patent summary would show it, which 11:41:27
9 is -- Mr. Simons, it's Page 8 of the submission that says 11:41:36
10 '205 patent-WW. So if you go -- stay with the patent 11:41:40
11 summaries in the front of the document, please. 11:41:48

12 MR. JAMESON: Mr. Simons, to the very beginning of 11:41:53
13 the document in the '205 patent, worldwide summary. 11:41:56

14 THE WITNESS: Keep going. That shows it right 11:42:02
15 there. So the Digital Network Architecture, you can see 11:42:07
16 about halfway down the page. That has a predecessor. 11:42:13

17 THE COURT: What is it? 11:42:35

18 THE WITNESS: It is -- well, for part of the time, 11:42:35
19 that actual DNA Center product was out there, and let me see 11:42:40
20 with respect to -- let me get my data. 11:42:50

21 I don't have the specific model numbers. I could 11:43:22
22 get those. I don't have that at my fingertips, but there 11:43:25
23 were predecessor models, there was an appliance and software 11:43:28
24 products that performed the same functions and role that the 11:43:35
25 DNA Center -- the accused DNA Center hardware began providing 11:43:40

—Becker, S. - Direct—

1 when it was introduced in September of 2017.

11:43:46

2 THE COURT: All right. I think your time is about
3 up, Mr. Jameson.

11:43:54

11:43:56

4 MR. JAMESON: One final question, Your Honor, and
5 I'll be done.

11:43:58

11:44:00

6 BY MR. JAMESON:

11:44:01

7 Q. Dr. Becker, does any of the data that you provided to the
8 Court change any of your opinions in this case?

11:44:01

11:44:04

9 A. It does not.

11:44:07

10 MR. JAMESON: Thank you, Your Honor.

11:44:09

11 THE COURT: All right. Well, I'll hear argument,
12 first from the plaintiff.

11:44:12

11:44:22

13 MR. ANDRE: May I proceed?

11:44:59

14 THE COURT: You may.

11:45:01

15 MR. ANDRE: And we'll pick up on slide 24 in the
16 book that we gave you, Your Honor.

11:45:02

11:45:09

17 Now, in the 2015-2016 time period -- if we can go to
18 presentation mode, Geoff.

11:45:12

11:45:19

19 THE COURT: All right. I got it.

11:45:27

20 MR. ANDRE: Okay. The slide 24, this was an exhibit
21 we entered, PTX-1450. This was an SEC filing from the
22 2015-2016 time period.

11:45:28

11:45:32

11:45:38

23 What we showed in this case, Your Honor, was that
24 Cisco recognized that their switches and routers were going
25 to be commoditized, and that was what they wanted to avoid,

11:45:39

11:45:41

11:45:46

1 so they went through a process of redesigning and trying to 11:45:49
2 come up with a new networking solution. That's what this 11:45:52
3 case is really about. And you remember the famous press 11:45:56
4 release you saw many times, PTX-452, about the launch of the 11:46:00
5 new era of networking, and they successfully launched that in 11:46:04
6 the summer of 2017. 11:46:08

7 And the next slide, 25, in the SEC filing in 11:46:09
8 2017-2018 time period, they state, quote, "In fiscal 2017, 11:46:18
9 they announced the initial development of new network product 11:46:22
10 offerings that feature intent-based networking technology." 11:46:25
11 And they focused on security. The impetus of this or kind of 11:46:31
12 the anchor of this whole product offering was the Catalyst 11:46:35
13 9000 series of switches. 11:46:39

14 Now, this was such a successful launch, and we 11:46:40
15 showed you in the next slide, in PTX-333, the CEO announced 11:46:44
16 that -- 11:46:51

17 THE COURT: Where are you? 11:46:52

18 MR. ANDRE: Slide 26, Your Honor. 11:46:54

19 THE COURT: All right. I'm looking at slide 25. 11:47:00

20 MR. ANDRE: Slide 25 is the SEC filing from the 11:47:04
21 2017-2018 time period. 11:47:08

22 THE COURT: All right. Just a second. 11:47:10

23 MR. ANDRE: And that's PTX-1449. 11:47:17

24 THE COURT: All right. We're on 26 now? 11:47:36

25 MR. ANDRE: Yes. This is PTX-333. This is during 11:47:38

1 an earnings call. This is where Chuck Robbins, the Chairman 11:47:41
2 and CEO of Cisco, announced that "Cyber security continues to 11:47:45
3 be a top priority" for the business, "driving another 11:47:49
4 consecutive quarter of double-digit growth." This was the 11:47:53
5 double-digit-growth issue that came up in our case, and you 11:47:56
6 see above where the CFO, Kelly Kramer, announced that 11:47:59
7 "security was up 14 percent with strong performances." 11:48:03

8 THE COURT: All right. 11:48:07

9 MR. ANDRE: If we go to slide 27, showing PTX-515, 11:48:08
10 this is where the CEO trumpets the 9K advances. He says it's 11:48:13
11 the company's fastest selling product ever. And you see in 11:48:20
12 the document it says, "There have been many highlights and 11:48:22
13 headlines about the Catalyst 9000 product family and its 11:48:25
14 meteoric rise since it was launched in June 2017." "Fastest 11:48:31
15 ramping product in Cisco's history." "Fastest to exceed 11:48:31
16 \$1 billion quarterly run rate." And then at the very bottom, 11:48:37
17 "Cisco more than doubles its Catalyst 9000 customer base," 11:48:37
18 "Cisco winner in campus switching." 11:48:45

19 Now, what this shows is this launch in the summer of 11:48:46
20 2017 was a game changer for Cisco. It took them out of the 11:48:50
21 commoditization business and put them into a whole new 11:48:56
22 vertical. They now offered network infrastructure with 11:49:00
23 security, and it's hugely successful. 11:49:05

24 Now, we just saw Mr. Becker talk about how the 11:49:07
25 growth wasn't that great. He included a lot of other 11:49:11

1 switches in there, and a lot of those didn't quite sync up, 11:49:15
2 and we can talk about that in a few minutes, but what the CEO 11:49:18
3 is talking about, and what the market recognized, was a 11:49:22
4 tremendous growth of taking network infrastructure and adding 11:49:25
5 security to it. 11:49:30

6 And because of this technology that they put into 11:49:30
7 their systems, the systems -- the technology that we have 11:49:34
8 accused of infringing here and provided the evidence of 11:49:37
9 infringement, they had great financial gains, and their sales 11:49:42
10 went up by double digits in the security market. 11:49:46

11 So what we're seeking, Your Honor, in this case, for 11:49:51
12 damages, for past damages -- and slide 28 summarizes this. 11:49:53
13 We're looking for a reasonable royalty. We took the -- what 11:49:57
14 Mr. Gunderson did is take the actual revenues, he apportioned 11:50:03
15 the revenues to the smallest saleable practicing unit, as the 11:50:07
16 case law requires, and got to the actual footprint of the 11:50:12
17 invention. 11:50:14

18 He then applied a royalty rate of 8 to 10 percent 11:50:14
19 and showed what that would result in as far as damages. And 11:50:17
20 damages ranged between 445.6 to 557 million. Now, this is 11:50:20
21 not the newest numbers we got just last week, because it only 11:50:26
22 goes through December 2019. We don't have any 2020 numbers 11:50:31
23 in this. So that's the reason -- 11:50:35

24 THE COURT: What did you apply the percentage to? 11:50:35

25 MR. ANDRE: We did it to the apportioned revenues. 11:50:39

1 We took the revenues of the accused products over the time 11:50:42
2 period from June of '17 through December of 2019; we then did 11:50:45
3 an apportionment -- and we'll go through the apportionment 11:50:51
4 that we did -- based on top-line functionality, and then we 11:50:54
5 applied the percentages to that. 11:50:58

6 So that's the reason we're asking for the 11:51:01
7 accounting, because the damages period ended in December and, 11:51:03
8 obviously, we're in June, and now we have those numbers, 11:51:07
9 based on last week. We just don't have them in -- we're not 11:51:10
10 presenting it in our case in chief. 11:51:12

11 We're also looking for the relative pre- and 11:51:14
12 post-judgment interest and then the enhanced damages. 11:51:16

13 And let me talk a little bit about some of the 11:51:20
14 issues Your Honor raised. And we'll go to the next slide. 11:51:22
15 This is the royalty rate. This is the 10 and 5 percent that 11:51:23
16 we used in the Keysight. And Your Honor mentioned that, with 11:51:26
17 Keysight, you're not sure how you would weigh that because it 11:51:30
18 was in the middle of litigation. 11:51:35

19 This is relevant, to me, because a few years back I 11:51:36
20 had a series of trials in front of Judge Strom in Omaha, 11:51:38
21 Nebraska. And we had a case against AT&T and Sprint and then 11:51:44
22 T-Mobile. 11:51:48

23 In the case against AT&T, we did the whole trial. 11:51:49
24 We got right to the morning of my closing argument, and 11:51:52
25 Ms. Kobialka and the teams took all night negotiating a 11:51:55

1 settlement. So when I got up in the morning to go do my 11:51:58
2 closing argument, they had settled the case. 11:52:01

3 So the very next case with Sprint -- 11:52:03

4 THE COURT: Why don't you turn them loose again? 11:52:06

5 MR. ANDRE: Well, we tried. Ms. Kobialka is like a 11:52:09
6 pit bull once she gets ahold of something. 11:52:13

7 She pulled an all-nighter, and her crew, and they 11:52:18
8 got the case settled, and we went to the next trial against 11:52:20
9 Sprint, and we wanted to use that settlement agreement, and 11:52:21
10 Sprint raised the argument saying that it's not relevant 11:52:24
11 because it was in the middle of litigation. It actually 11:52:26
12 happened right before closing. 11:52:26

13 And Judge Strom -- he let that settlement in, and we 11:52:27
14 got the verdict against Sprint, and then that went up on 11:52:33
15 appeal to the Federal Circuit, and they raised this issue 11:52:37
16 that came up in this court, is that that settlement 11:52:39
17 agreement, because it happened in the middle of litigation -- 11:52:41
18 here it's at the very end of litigation -- it shouldn't have 11:52:41
19 been admitted; it wasn't relevant. 11:52:44

20 And this is a quote from the Federal Circuit. This 11:52:46
21 is the *Prism Technology v. Sprint* case. I actually argued 11:52:48
22 this Federal Circuit argument, as well, so it kind of hits me 11:52:52
23 personal. 11:52:54

24 And it says, "The circumstances of the AT&T 11:52:55
25 settlement agreement affect the Rule 403 assessment in ways 11:52:58

1 that support the district court's admission of the 11:53:03
2 agreement." 11:53:03

3 And if you read this quote, it actually talks about 11:53:03
4 how this settlement agreement is more probative than a 11:53:05
5 pretrial case. It says -- it takes away a lot of the 11:53:11
6 mystery. The case is before the parties. 11:53:15

7 And in the example of Keysight, they saw our case 11:53:17
8 and how strong it was. There was still a risk we would not 11:53:20
9 have gotten a jury verdict; there was a risk they could have 11:53:24
10 invalidated the patent; there's all that kind of stuff. 11:53:24

11 But what this case -- the proposition it stands for 11:53:27
12 is that the settlement agreement that was reached right 11:53:30
13 before the closing argument can actually be more reliable and 11:53:34
14 more probative than one that was before the litigation. 11:53:37

15 So that's the reason we think the Keysight 11:53:41
16 settlement agreement is relevant. And there's no other 11:53:46
17 license agreement in this entire case. Cisco said they 11:53:50
18 didn't have any license agreement. So this experience I had 11:53:53
19 with Judge Strom and then at the Federal Circuit really kind 11:53:56
20 of played very heavily in my mind why we wanted to use the 11:54:00
21 Keysight settlement agreement. 11:54:03

22 And then when it comes to the apportionment level, 11:54:06
23 this, once again, hits me kind of personal. If we go to the 11:54:09
24 next slide, we did the top-level function apportionment. You 11:54:12
25 remember Dr. Striegel talked about this. The reason we did 11:54:17

1 this is because, once again, it's another case I tried here 11:54:20
2 in Northern California in front of Judge Friedman. 11:54:23

3 We tried the case, and we had a technical expert do 11:54:26
4 top-level function apportionment, just like Dr. Striegel did. 11:54:29
5 It's the exact same methodology. The other side argued that 11:54:33
6 it wasn't appropriate because you shouldn't give equal weight 11:54:36
7 to the boxes and et cetera, et cetera, and some things fit 11:54:40
8 in, and some things don't. 11:54:41

9 We got the jury verdict in that case. Took it up on 11:54:43
10 the appeal to the Federal Circuit. I, once again, argued 11:54:45
11 this case to the Federal Circuit, and they said this 11:54:48
12 top-level function apportionment is exactly the right way of 11:54:51
13 doing apportionment. It's exactly the way Dr. Striegel did 11:54:54
14 it. 11:54:59

15 So I wanted to give those two, really, personal 11:54:59
16 experiences for me because, once again, we tried the case, we 11:55:02
17 took it to the Federal Circuit, they approved of this 11:55:05
18 methodology in saying that it should be one of the ways of 11:55:07
19 doing it. 11:55:12

20 So the evidence we present in the case with the 11:55:13
21 damages in particular, we first looked at how profitable the 11:55:17
22 Cisco's accused products were. And you saw that, in this 11:55:20
23 case, that the switches and routers and all the appliances 11:55:24
24 had a very high profitability. 11:55:30

25 I mean, this is hardware, and they're having 11:55:32

1 profitability ranging anywhere from 56 to 91 percent, 11:55:34
2 91.5 percent. The Digital Network Architecture, which they 11:55:39
3 kind of give away for free, is the only one that showed no 11:55:43
4 gross profit. But the profit levels were astounding. 11:55:45

5 We then looked at the apportioned royalty, and this 11:55:48
6 is what we talked about, the top-line function apportionment. 11:55:51
7 So we did an apportionment of the Catalyst switches. We took 11:55:55
8 the total revenue and got a base and apportioned it down to 11:55:58
9 31 percent of the revenue. And you see 25 percent for the 11:56:02
10 Aggregation Services Routers, 44 percent for Integration 11:56:02
11 Services Routers, et cetera. 11:56:09

12 That's the apportionment that Dr. Striegel did based 11:56:10
13 on his technical analysis. And he took the lowest number. 11:56:13
14 For example, the Catalyst switches, the functionality in some 11:56:17
15 of them were 5 and 13 and 6 and 13, but we went to the lowest 11:56:20
16 number, 4 and 13. We gave the most conservative number in 11:56:23
17 each instance. 11:56:28

18 So that was how we got our apportionment royalty 11:56:30
19 base. We applied this percentage of apportionment to the 11:56:33
20 sales number. And when you do that, on the next slide, you 11:56:33
21 see that these are the total sales we had at that time of 11:56:37
22 switches and routers and et cetera, and you see the Catalyst 11:56:43
23 switches were \$8 billion. You were just told Dr. Becker's 11:56:46
24 number is closer to \$11 billion if you were to put updated 11:56:50
25 numbers in, but it's \$8 billion at the time we had it. 11:56:52

1 We took the apportionment value of 31 percent. That 11:56:56
2 gives you the apportioned revenue, the royalty base. So the 11:56:59
3 royalty base was \$5.53 billion. No instead of having the 11:57:02
4 \$16 billion, we apportioned down to \$5 billion, which is a 11:57:08
5 pretty significant apportionment, down almost more than 11:57:12
6 one-third. So it's almost a 68, 69 percent apportionment, 11:57:15
7 taking those revenues out to get to the footprint of the 11:57:19
8 invention. 11:57:22

9 Now, as I said earlier, then we had to figure out 11:57:24
10 what royalty rate to apply to this apportioned base of 11:57:28
11 \$5.53 billion, and we asked Cisco, Do you have any comparable 11:57:33
12 licenses? And in their interrogatories, they said they're 11:57:36
13 not aware of any Patent License Agreement that relates to the 11:57:40
14 functionality of the accused instrumentality. 11:57:42

15 So Cisco said they had no licenses whatsoever. So 11:57:46
16 the only license that was relevant in this case is Keysight 11:57:48
17 and how the Court weighs that Keysight license. 11:57:51

18 So we took the Keysight license, and we applied the 11:57:54
19 royalty rate of 10 and 8 percent. The 10 percent rate was 11:57:58
20 based on the fact that it was a competing product. These are 11:58:02
21 competing products. This is taking sales out of 11:58:08
22 Centripetal's pockets. So we went into a higher royalty 11:58:10
23 rate. 11:58:14

24 We reduced it down 2 percent, less than all the 11:58:15
25 patents that are found to be infringing. So you apply the 8 11:58:17

1 and 10 percent to the royalty basis of each one of these 11:58:21
2 categories, and you get these numbers we talk about; 11:58:23
3 \$555.2 million at 10 percent and \$444.3 million at 8 percent. 11:58:28

4 So that's what Mr. Gunderson provided in his 11:58:33
5 opinions. 11:58:37

6 Now, one of the things that was interesting in the 11:58:38
7 last two weeks, after Your Honor ordered Cisco to provide the 11:58:41
8 numbers of the predecessor products and the current 11:58:45
9 products -- and we looked at the actual increase in 11:58:48
10 revenues -- now, we only applied it to the 3000 series. And 11:58:52
11 that was based on what the evidence was that went into this 11:58:59
12 case. 11:59:02

13 The two exhibits we just saw, they weren't produced 11:59:02
14 in this case; we never saw them before. What we had was the 11:59:05
15 closing argument, and this was Cisco's attorney, and they're 11:59:08
16 doing the line of how the 9000 switch evolved. And this is 11:59:13
17 on Page 3369 through 3370 of the trial transcript. 11:59:18

18 And Cisco's attorney said, "And so what we see here 11:59:22
19 on top, the history of the Catalyst 9000 is 3850 and 3650." 11:59:26
20 So they said that the history was the 3850 and 3650, and 11:59:31
21 that's what evolved to the 9000 series of switches. And so 11:59:36
22 when Peter Jones is working on it, and as you see, you can go 11:59:41
23 through it, in 2016 there's a 3650 and 3850; in 2019 there's 11:59:42
24 a Catalyst 9000 released with these updates. 11:59:46

25 So we based that on the evidence that went into this 11:59:49

1 case, that plus Exhibit 1248, PTX-1248. So we limited that 11:59:53
2 to the 3000 series on those explicit statements from Cisco's 11:59:58
3 counsel. 12:00:04

4 We then looked at the overage based on those 12:00:04
5 revenues, and we go to the next slide, and this is slide 22, 12:00:08
6 I'm sorry. This is out of order, Your Honor. This is going 12:00:14
7 back to slide 22 in your book. 12:00:16

8 If we look at the accused switches and the increase 12:00:18
9 in revenues based on the 3000 series compared to the 9000 12:00:21
10 series -- and you saw the increase in revenues over this time 12:00:26
11 period -- and we apply a royalty rate, and you get a royalty 12:00:29
12 rate of -- royalty numbers based on this increased sale, 12:00:33
13 looking at the footprint here, of \$557 million at 10 percent 12:00:38
14 and \$446 million at 8 percent. 12:00:42

15 What is somewhat remarkable about that -- and this 12:00:45
16 is based on just the raw numbers they put forward -- is that 12:00:48
17 is almost spot on with Dr. Gunderson's apportionment method. 12:00:52
18 At 10 percent, he had \$555 million, instead of 557, and at 12:00:56
19 8 percent, he had \$444 million, instead of 446. 12:01:01

20 So if we did just the royalty based just on increase 12:01:05
21 and revenues that these new products offered, they come out 12:01:09
22 almost spot on with what Mr. Gunderson had argued based on 12:01:12
23 the apportionment that was done with Dr. Striegel. 12:01:16

24 So those are the damages that we're looking at -- 12:01:28
25 the actual numbers. 12:01:34

1 We're also seeking other remedies in this case, as 12:01:35
2 we've talked about. If we can go back to slide 36 and 37, we 12:01:39
3 are looking for injunctive relief. 12:01:42

4 Now, we appreciate the important role that Cisco 12:01:45
5 plays in the networking industry and networking business and 12:01:49
6 in the role that security plays, and we don't want to take 12:01:53
7 those routers and switches off the market. That's not what 12:01:57
8 our goal is here. 12:02:00

9 Our goal is injunctive relief to stop infringement 12:02:01
10 of the firewalls. That's a direct competing product, and our 12:02:04
11 product, RuleGATE, can go in there. 12:02:08

12 Monetary compensation cannot address the irreparable 12:02:11
13 harm that Centripetal has been facing since Cisco's come onto 12:02:16
14 this market. We've lost market share, not only to Cisco, but 12:02:20
15 to other companies that are copycatting it. We heard 12:02:22
16 evidence of that. We've had injury to our reputation. We're 12:02:27
17 not the ones in the forefront now, as we were before, early 12:02:28
18 on. There's the willful nature of the infringement, because 12:02:32
19 we were -- we had an NDA signed with Cisco, and Cisco is a 12:02:36
20 roadmap for their copycats, their competitors. 12:02:41

21 The balance of hardship clearly weighs in favor of 12:02:44
22 Centripetal. It's a small company fighting day-to-day to 12:02:47
23 survive against Cisco, and taking the technology out of their 12:02:49
24 firewalls so Centripetal can put their appliances into that 12:02:53
25 network is not going to have a dramatic effect on Cisco, but 12:02:59

1 it would have that on Centripetal. 12:03:04

2 THE COURT: What did you just say? 12:03:08

3 MR. ANDRE: That taking the infringing technology 12:03:11
4 out of Cisco's firewalls, only the firewalls -- we're not 12:03:14
5 asking to take it out of the routers and switches. Taking it 12:03:18
6 out of the firewalls, it would not have a material impact on 12:03:21
7 Cisco. Their big business is routers and switches. But it 12:03:24
8 would have a major impact on Centripetal. 12:03:29

9 If we can put our RuleGATE products into these 12:03:32
10 networking systems using advanced technology, that would have 12:03:37
11 a material impact on Centripetal and wouldn't have a hardship 12:03:41
12 on Cisco. So that's the reason we want the injunction on the 12:03:45
13 firewalls only. 12:03:48

14 The injunction does serve the public interest. 12:03:49
15 Obviously, patents are there to prevent people from 12:03:52
16 unlawfully or, without licenses, putting their -- taking 12:03:57
17 someone's technology and just using it. It does protect them 12:04:02
18 from innovation and innovative companies like Centripetal. 12:04:06

19 Public interest is also served. As you heard in 12:04:10
20 this case, Centripetal's product is fast. It can do 5 12:04:12
21 million rules compared to 10,000 rules. It is a better 12:04:15
22 product offering. Centripetal can offer better security at 12:04:18
23 the firewall than what Cisco can do. And Centripetal can 12:04:22
24 meet the public need for this technology. We have the 12:04:28
25 infrastructure and the capability to ramp up and supply sales 12:04:31

1 for any of those Cisco firewalls. 12:04:36

2 With the routers and switches, all we're asking for 12:04:39
3 is a running royalty. We think that if they want to keep the 12:04:41
4 infringing technology in the routers and switches, that's 12:04:44
5 okay, but they should pay a royalty going forward for the 12:04:47
6 life of these patents, as long as that technology is in. 12:04:50

7 So that's what we're asking for, Your Honor, on the 12:04:58
8 additional remedies outside of the monetary damages for the 12:05:00
9 past infringement. 12:05:03

10 Unless Your Honor has any questions, I'll turn it 12:05:05
11 over to Mr. Jameson and let him give his argument. 12:05:07

12 THE COURT: All right. 12:05:10

13 MR. ANDRE: Thank you. 12:05:11

14 MR. JAMESON: Your Honor, may I proceed? 12:05:14

15 THE COURT: You may. 12:05:18

16 MR. JAMESON: Mr. Andre, could we pull up slide 26, 12:05:18
17 please. 12:05:21

18 Your Honor, there was testimony about this at trial, 12:05:21
19 and I just want it to be crystal clear that the double-digit 12:05:33
20 growth in security, that 14 percent, if you look in the 12:05:38
21 record -- it's at around Page 1531 -- the security segment of 12:05:41
22 the market has no reference to switches and router 12:05:48
23 technology. That is a different segment in Cisco's breakout 12:05:52
24 of how it reports earnings for its product. 12:05:58

25 And there's testimony on that in the record, so I 12:06:01

1 just wanted to make that point clear. 12:06:04

2 And then, Lori, I need to pull up a PowerPoint. Can 12:06:07
3 I just share the screen, and will it work that way? 12:06:13

4 THE CLERK: Yes, sir. 12:06:16

5 MR. JAMESON: Okay. I think that works. 12:06:44

6 Your Honor, this is in your binder that we submitted 12:06:47
7 to the Court, as well, and I wanted to begin with a very 12:06:50
8 important point here, which is the various accused 12:06:57
9 combinations -- 12:07:01

10 THE COURT: Which book is this in? 12:07:02

11 MR. JAMESON: It should be in "Additional materials 12:07:05
12 for damages hearing." It should be the first document. 12:07:07

13 THE COURT: All right. I've got it. 12:07:13

14 MR. JAMESON: And I'm at slide 3. 12:07:15

15 The accused combinations is a very important point 12:07:18
16 in this case because when you look at the patented 12:07:22
17 improvement, which is, if we're going to get to damages in 12:07:27
18 this case, that's what it's all about. There is a consistent 12:07:30
19 proof thematic throughout this case that Centripetal points 12:07:38
20 to the patented improvements in the management appliance; 12:07:40
21 Stealthwatch, DNA, ISE, FirePower Management Consoles. 12:07:45

22 They're not pointing to the patented improvements in 12:07:55
23 the Catalyst switches in the Aggregation Services Routers, in 12:07:57
24 the Integration Services Routers, or in the firewalls that 12:08:01
25 are at issue, because those products have been in the 12:08:06

1 marketplace for the better part of two decades and they've 12:08:10
2 been dealing with packet-filtering rules and blocking traffic 12:08:13
3 and rule swapping and things like that for a long, long time. 12:08:17
4 And so that's an important point to keep in mind when you get 12:08:21
5 to damages, which is: Where is the patented improvement? 12:08:27

6 With respect to Mr. Gunderson's analysis, Dr. Becker 12:08:31
7 hit on this at trial. And Mr. Gunderson went all in. He did 12:08:38
8 a one-stop shopping that Cisco owes \$446 million to 12:08:43
9 \$557 million based on an infringement of all five patents and 12:08:51
10 all five patents being found invalid. 12:08:55

11 He did no analysis on a patent-by-patent basis. 12:08:57
12 That is very important because, for example, his royalty base 12:09:02
13 remains the same no matter what patent might be infringed or 12:09:07
14 valid, but the dates of first infringement are wildly across 12:09:13
15 the board with respect to the various patents, and so at a 12:09:21
16 bare minimum, that royalty base should be changing every 12:09:23
17 single time that we're talking about a specific patent. 12:09:26

18 And so big picture; he's all in. It's five 12:09:30
19 infringements, five valid patents. 12:09:35

20 Now, with respect to the three data points that he 12:09:38
21 uses, Dr. Becker called this a three-legged stool, and that 12:09:40
22 if any leg of the stool is broken or flawed, the entire 12:09:47
23 analysis breaks down. And, respectfully, every single leg of 12:09:51
24 his stool is flawed. 12:09:55

25 Beginning with the Keysight royalty rate, you 12:09:58

1 presided over that trial. You've heard all the differences 12:10:01
2 of what led to that two-page term sheet, a midtrial 12:10:05
3 settlement, a worldwide license to 23 patents. Keysight was 12:10:10
4 a direct competitor -- 12:10:17

5 THE COURT: Why do we talk sometimes about U.S. 12:10:21
6 sales and other times about worldwide sales? 12:10:25

7 MR. JAMESON: Well, Your Honor, candidly, our view 12:10:28
8 of the world is that this is a patent case about U.S. patents 12:10:30
9 and that U.S. sales should be at issue. They're making the 12:10:34
10 argument that they're entitled to worldwide sales. We 12:10:38
11 obviously disagree with that, and that's why Dr. Becker, in 12:10:42
12 his supplemental material he provided to the Court, he has 12:10:45
13 broken this down on both the U.S. and a worldwide basis. 12:10:49

14 THE COURT: Well, I mean, if the products were made 12:10:53
15 in the U.S., or designed in the U.S., it wouldn't make any 12:10:59
16 difference where they were sold, would it? 12:11:07

17 MR. JAMESON: And there has been evidence in this 12:11:10
18 case that certain things that they're accusing are not in the 12:11:13
19 United States. And -- 12:11:16

20 THE COURT: Well, I don't think everything was in 12:11:20
21 the United States. I think that's right. 12:11:22

22 MR. JAMESON: That's right. 12:11:25

23 And, Your Honor, the point about beginning with the 12:11:27
24 Keysight royalty rate is, somehow or another, Mr. Gunderson 12:11:29
25 ignores the lump sum payment for past damages, which is what 12:11:34

1	we're fighting about here, and instead, he goes to the	12:11:38
2	running royalty rate that was 5 percent and 10 percent for	12:11:41
3	directly competitive products, and somehow or another, he	12:11:45
4	bumps that up to 8 to 10 percent, and that just doesn't make	12:11:51
5	any logical sense at all. He made no attempt to demonstrate	12:11:55
6	technical comparability or comparability between --	12:12:01
7	THE COURT: Does the running royalty apply to future	12:12:05
8	sales or past sales or both?	12:12:08
9	MR. JAMESON: It applied to a three-year term	12:12:10
10	following the trial.	12:12:12
11	THE COURT: So it was future sales.	12:12:15
12	MR. JAMESON: Future sales.	12:12:17
13	THE COURT: All right. Well, 25 million could apply	12:12:18
14	to past sales, couldn't it?	12:12:23
15	MR. JAMESON: But he didn't, Your Honor, and	12:12:26
16	Keysight and Centripetal didn't agree to a running royalty	12:12:28
17	for past sales. They agreed to a lump sum. And the	12:12:32
18	testimony in this case is that's what Cisco would prefer, is	12:12:35
19	a lump sum payment, which is ultimately what Dr. Becker did.	12:12:39
20	And keep in mind the Keysight agreement --	12:12:43
21	THE COURT: Well, it seems like every time somebody	12:12:46
22	gets into a running royalty rate, the case comes right back	12:12:49
23	to the Court in a dispute over what the royalty applies to.	12:12:53
24	MR. JAMESON: That is exactly right, and the running	12:12:59
25	royalty in the Keysight case was for a worldwide license to	12:13:02

1 23 patents. Here we're dealing with five patents on a U.S.
2 basis. And Dr. Becker went through all of this in his
3 testimony, as to why that rate just doesn't make any sense
4 and should not be used, and if you throw out that rate, then
5 Mr. Gunderson's analysis, at that point, the stool is broken.
6 You go to the royalty base.

7 He's got 100 percent of every sale of every product
8 that's at issue in this case regardless of the accused
9 combination. That cannot be right.

10 THE COURT: Well, no, he didn't. He apportioned it
11 based on the functionality of the various elements of the
12 system.

13 MR. JAMESON: Your Honor, I'm going to get to that
14 next, but his beginning royalty base is 100 percent of every
15 router and switch that was sold, regardless of whether it's
16 part of an accused combination, and we would need to -- you
17 would -- at a bare minimum, you would need to go through on a
18 patent-by-patent basis, look at the accused combination, and
19 figure out what the numbers are for each accused combination,
20 and Mr. Gunderson made no effort to do that at all.

21 And in addition, there's a bunch of accused products
22 in his -- non-accused products in his base, such as tables
23 and replacement parts that are sold separately, and again,
24 Dr. Becker said that that number -- it approaches almost
25 \$4 billion of non-accused products. And so his base is

1 flawed.

12:14:44

2 And then to your point about the apportionment
3 issue, which is the third leg of the stool, Your Honor,
4 Dr. Striegel's analysis -- it can't even get out of the
5 batter's box. He acknowledged that he did no analysis of the
6 incremental value of the patented improvement, and that's
7 what apportionment is all about.

12:14:45

12:14:48

12:14:55

12:14:58

12:15:01

12:15:04

8 And instead, he took -- he took 100 percent of
9 processors, and he took 100 percent of ASICs, and he took
10 100 percent of switching technology, despite it being
11 absolutely beyond debate that processors and switches and
12 switching technology -- that that's got nothing to do with
13 the patented improvement in the inventions. And every single
14 one of our technical experts took Dr. Striegel to task for
15 that.

12:15:06

12:15:10

12:15:15

12:15:18

12:15:25

12:15:28

12:15:33

12:15:38

16 And so if -- and at a bare minimum, he had an
17 obligation to do a further apportionment analysis, and he
18 didn't do so, and so that leg of the stool is broken. And
19 when all three legs of the stool are broken, Mr. Gunderson's
20 analysis -- it just doesn't work.

12:15:38

12:15:42

12:15:45

12:15:49

12:16:02

21 So where do you go? You go to Dr. Becker's
22 analysis. And he is the only expert in this case that has
23 done an analysis on a patent-by-patent basis, and he
24 literally drilled down, and as part of his analysis, he
25 looked for what is the patented improvement; what is the

12:16:05

12:16:08

12:16:10

12:16:16

12:16:20

1 value of the patented improvement? And that is exactly what
2 the law requires. At slide 7, the patentholder should only
3 be compensated --

4 THE COURT: He lost me, Mr. Jameson, when he said
5 that the only value to the security alerts was when it
6 alerted and reduced it by a percentage of how many alerts
7 there were as compared to how many packets were checked.
8 There's no way the Court will accept that analysis.

9 MR. JAMESON: Is that with respect to the '856
10 patent?

11 THE COURT: Well, I think he did it on all the
12 patents, actually.

13 MR. JAMESON: Well, Your Honor, he went through a
14 detailed analysis as to what he believed to be the patented
15 improvement in each patent, and we've got a number of slides
16 that show that.

17 THE COURT: Well, that particular theory borders on
18 the absurd.

19 MR. JAMESON: Your Honor, for every single patent,
20 he identified what he believed to be the patented improvement
21 and isolated the value of that. And I will -- I can take you
22 through the --

23 THE COURT: Please don't do that again. I've got it
24 in the record.

25 MR. JAMESON: Your Honor, I would be -- I would love

1 to respond to a question because Dr. Becker's analysis is 12:18:06
2 spot on under the law, and Mr. Gunderson's analysis could not 12:18:10
3 be more flawed. 12:18:14

4 THE COURT: I'm not talking about Mr. Gunderson's 12:18:17
5 analysis, but to expect the Court -- I mean, the analogy we 12:18:19
6 used -- the other side used, which I think is spot on, 12:18:25
7 talking about something spot on, is that an air bag in a 12:18:31
8 car -- or I suppose the same would apply to a seat belt -- is 12:18:36
9 of no value unless it deploys. And that's -- as I said, that 12:18:43
10 borders on the absurd, and he made a huge reduction based on 12:18:51
11 that analysis. 12:18:56

12 MR. JAMESON: Your Honor, he -- 12:19:01

13 THE COURT: Of course, most of the damages here 12:19:03
14 relate to switches and routers, as opposed to other parts of 12:19:07
15 the system. 12:19:14

16 MR. JAMESON: Your Honor, if we actually look at 12:19:17
17 what they identify as the so-called patented improvement, 12:19:20
18 it's not in the routers or switches, it is in the appliances 12:19:26
19 that manage or work with the routers and switches, and that 12:19:29
20 is exactly what Dr. Becker focused on as part of his 12:19:32
21 analysis. The accused routers and switches -- 12:19:38

22 THE COURT: That's not what Mr. Llewallyn and 12:19:40
23 Mr. Jones said. 12:19:45

24 MR. JAMESON: Your Honor, Mr. Llewallyn and 12:19:46
25 Mr. Jones -- they provided testimony that the accused routers 12:19:49

1 and switches and firewalls have been doing what is being 12:19:52
2 accused for the better part of a decade, and that's what we 12:19:56
3 show on slide 9, which is the routers and switches and 12:20:02
4 firewalls, that we have been doing packet filtering, rule 12:20:06
5 swapping, we've been using NetFlow, we've been processing 12:20:11
6 rules, we've been dropping and blocking packets -- we've been 12:20:16
7 doing that forever. That's conventional technology in our 12:20:19
8 routers and switches. 12:20:23

9 And so the question becomes, What is the patented 12:20:24
10 improvement in these various patents? And this is what these 12:20:29
11 slides, beginning at slide 10, on a patent-by-patent basis, 12:20:35
12 that's what we're trying to drill down into here. 12:20:40

13 Prior to March 13th of 2018, Cisco routers and 12:20:46
14 switches, we were dropping packets; we were exporting NetFlow 12:20:52
15 records; we were analyzing NetFlow records; we were creating 12:20:58
16 rules and sending them down through the system. And at a 12:21:04
17 high level, that appears to be what Centripetal is saying 12:21:08
18 this patent is about, but they focus on ETA. Because they 12:21:13
19 had to find something new with respect to the '856 patent, 12:21:20
20 they focus on ETA. 12:21:23

21 And a very important point: The date of first 12:21:24
22 infringement here is March 13, 2018, it's not June 2017 when 12:21:31
23 ETA was announced. It's a year later. So we don't go back 12:21:37
24 to June 2017 with respect to this patent. It's a different 12:21:41
25 damages period. 12:21:45

1 But what Dr. Becker did is focusing on what is new 12:21:47
2 and different, which is they're saying it's ETA working with 12:21:51
3 Cognitive Threat Analytics. He looked at the actual: How is 12:21:59
4 it being used in the marketplace? What is the benefit of 12:22:02
5 this new technology? And he focused on, first of all, the 12:22:05
6 number of customers that are actually using Stealthwatch, and 12:22:09
7 it was 2,493. It's a whole lot less than the 98,800 12:22:14
8 customers that have purchased routers or switches. 12:22:22

9 And then he looked at the testimony in the case. 12:22:26
10 How many customers are actually sending ETA-enabled NetFlow 12:22:29
11 to Stealthwatch and CTA for analysis? And, Your Honor, it's 12:22:34
12 undisputed; the number is incredibly small. And that is what 12:22:37
13 damages is about; what is the benefit of the patented 12:22:43
14 improvement? And that's how he leads to his number of a 12:22:47
15 little over \$2 million for the '856 patent. And he proceeded 12:22:51
16 to do this for every patent. 12:22:55

17 And with respect to the '193 patent, he shows 12:22:59
18 everything that was already in the marketplace that appears 12:23:04
19 to be covered by the '193 patent, and it was the 12:23:08
20 implementation of packet-filtering rules. Cisco's routers 12:23:12
21 and switches have been implementing packet-filtering rules 12:23:18
22 going back before the year 2000. 12:23:21

23 ISE was implemented in March of -- April of 2011. 12:23:24
24 ISE allows you to send quarantine commands. Well, that's 12:23:31
25 what they're saying the '193 patent is all about. Well, 12:23:35

1 we've been doing that for eight years now. So the question
2 becomes, What is the patented improvement relative to what we
3 have been doing?

4 And Dr. Becker's analysis is it's very, very small,
5 because in order for them to make out their infringement case
6 for the '193 patent, despite all of their protests, they go
7 to Stealthwatch. They reference Stealthwatch 24 times. They
8 relied on CTA source code. They relied on ISE source code.
9 And the reason that they do that is that information has to
10 be sent down from those devices through the routers and the
11 switches. And the routers and the switches, what are they
12 doing? They're implementing yet one more rule. They've been
13 implementing rules for a decade, 10,000 or more, and that was
14 the point that Dr. Becker was making.

15 The '193 patent, from a value proposition, it's just
16 one more rule that a router or a switch can implement. And
17 what is the value of that? It's not that valuable.

18 He goes through the same analysis for the '176
19 patent. What existed previously? What comes later? What's
20 the patented improvement? And again, the patented
21 improvement that Centripetal relies on, they tie it to
22 changes in Stealthwatch and Cognitive Threat Analytics. It's
23 got nothing to do with the routers or the switches.

24 And, in fact, if you look to the bottom right of
25 slide 14, actually, the date of first infringement, based on

1 the record evidence in this case, is going to be either April 12:25:37
2 of 2018 or sometime in 2019, because that's what Dr. Cole 12:25:40
3 relied on to prove up infringement. It is not going back to 12:25:48
4 August of 2017. 12:25:51

5 And again, the correlation and the sending of 12:25:55
6 NetFlow up to Stealthwatch, that's been happening in the 12:26:01
7 marketplace for six years, at least. And that's what 12:26:04
8 Dr. Becker focused on. 12:26:10

9 And the important point of his analysis was that in 12:26:12
10 Cisco's experience, only .4 percent of threats are actually 12:26:20
11 identified using Cognitive Threat Analytics, and that was the 12:26:27
12 trigger point for Centripetal's infringement theory. And 12:26:32
13 with that kind of de minimus use, that's how you value the 12:26:37
14 benefit of the patented improvement, and that led to 12:26:44
15 Dr. Becker's analysis that this patent was worth a little 12:26:46
16 over \$400,000. 12:26:49

17 THE COURT: Well, I guess if only .4 percent of seat 12:26:55
18 belts or air bags deployed, then they're only worth 12:27:03
19 .4 percent of what it cost to put them in the system. 12:27:13

20 MR. JAMESON: Your Honor, I don't believe that was 12:27:17
21 Dr. Becker's point. I believe if you look at the trial 12:27:18
22 transcript, what Dr. Becker said is that, if the air bag is 12:27:22
23 disabled, even if it's in the car, it's of no value. That 12:27:29
24 was his point, if you look at the trial record. 12:27:34

25 Obviously, if a car is sold with an air bag, of 12:27:37

1 course there's value in it, and he acknowledged that. But 12:27:39
2 when it comes to damages, we have to figure out -- and again, 12:27:44
3 that's a very important point, because I know that's what he 12:27:49
4 testified to. 12:27:52

5 THE COURT: Of course, one threat that turned out to 12:27:52
6 include malware could cause millions of dollars in damages, 12:27:59
7 couldn't it? 12:28:08

8 MR. JAMESON: Well, certainly, a network threat that 12:28:10
9 gets through firewalls and gets past -- gets through 12:28:13
10 Stealthwatch and all the various security equipment that's 12:28:17
11 out there, it could -- 12:28:21

12 THE COURT: If that's all it was worth, your sales 12:28:23
13 wouldn't be so high. 12:28:25

14 MR. JAMESON: Your Honor, the switches and routers 12:28:28
15 sales are so high because Cisco is the leading company that 12:28:30
16 has been selling switches and routers going back to the 12:28:33
17 1980s. In fact, an interesting point is, even during this 12:28:37
18 litigation, the entity that actually bought an accused 9300 12:28:41
19 switch from Cisco is Centripetal, because they needed the 12:28:46
20 best switching technology in the marketplace. 12:28:49

21 They didn't buy it for network. They didn't buy it 12:28:52
22 for network security. They bought it because switches and 12:28:54
23 routers sold by Cisco are the best in the industry. And do 12:28:57
24 switches and routers -- do they also implement security? Of 12:29:03
25 course, they do. But the fact that a network breach could be 12:29:07

1 worth millions of dollars -- well, I mean, we still have to
2 look at what the patents cover. We have to look at what the
3 patents cover, and these patents don't cover blocking all
4 network threats; they just don't. I mean, the '806 patent is
5 a rule-swapping patent. The '193 patent is literally the
6 implementation of a single rule.

7 And with respect to what's going on with
8 Stealthwatch and CTA, the fact that CTA is only being used in
9 .4 percent of threats, it doesn't mean that there's not other
10 technology that's being used to block those threats. That's
11 just the percentage that's being used by CTA, and that's what
12 they're accusing of infringement with respect to the '176
13 patent.

14 I mean, hopefully, these threats don't get into the
15 network because Cisco's firewall has blocked them, or maybe
16 Stealthwatch has done some kind of an analysis that is
17 allowed to implement a rule to stop future traffic from
18 coming in, but we've got to look at, from a damages
19 perspective, what are they accusing of infringement? And
20 here, it's the interactions with CTA, and there's a very
21 limited-use case with respect to CTA.

22 And then, finally, with respect to the '205 patent,
23 again, this isn't tied to the routers and the switches, this
24 is tied to the management appliances. Routers and switches
25 have been handling SIP traffic going back to, again, the year

1 2000. Firewalls have been processing SIP traffic going back 12:31:14
2 to the year 2000. 12:31:20

3 The trigger point for infringement in this case, it 12:31:21
4 was tied to the release of the DNA Center in June of 2019, 12:31:26
5 and with respect to the firewalls, it was tied to the release 12:31:37
6 of the threat intelligence director in October of 2017, and 12:31:44
7 so the patented improvement, if any, that's what you look at 12:31:49
8 for purposes of a damages analysis, and that is exactly what 12:31:54
9 Dr. Becker did. 12:31:59

10 And he apportioned down, trying to find the patented 12:32:01
11 improvement, and it's not in the routers and the switches, 12:32:06
12 but it's in the appliances that are working with the routers 12:32:11
13 and the switches, and that resulted in a number of just over 12:32:15
14 \$360,000. 12:32:22

15 I already hit on the '806 patent, but, again, Your 12:32:26
16 Honor, the record is unequivocal on this. Rule swapping that 12:32:30
17 they're accusing of infringement, with respect to the '806 12:32:38
18 patent, that's been happening in the Catalyst switches going 12:32:42
19 back to the year 2011 with the Catalyst 6500, and it was 12:32:45
20 happening back in 2013 with the ASA appliances when they 12:32:51
21 introduced the Transactional Commit Model software. 12:32:59

22 And that's what that patent is driving at, rule 12:33:03
23 swapping. We've been doing that for nine years -- literally 12:33:07
24 what they're accusing, we've been doing for the better part 12:33:13
25 of a decade. How do they create their infringement? They go 12:33:16

1 to the management appliances, and they say that there's 12:33:19
2 something new and different in the DNA Center, which was 12:33:23
3 released in late 2019, and that's the date of first 12:33:28
4 infringement as supported by the evidence at trial. And 12:33:35
5 there's something about the DNA Center with preprocessing of 12:33:39
6 rules that they're going as the patented improvement, and 12:33:43
7 that's what Dr. Becker, again, focuses on. 12:33:48

8 And with respect to the '806 patent, based on what 12:33:53
9 Cisco has been doing with their firewalls and switches for 12:33:57
10 close to a decade, he found minimal improvement as to what 12:34:02
11 existed in the prior art, because Cisco's prior management 12:34:07
12 appliances -- they were pushing rules down as well. And so 12:34:11
13 you have to ask yourself, What is the value proposition? And 12:34:16
14 he said that there was no incremental profit, and therefore, 12:34:20
15 under the Georgia-Pacific analysis, he ultimately came out to 12:34:24
16 a number that was a little -- right at \$260,000. 12:34:28

17 And I think it's really important to understand 12:34:46
18 that, when you are looking at these products like 12:34:49
19 Stealthwatch and ETA and Cognitive Threat Analytics, 12:34:54
20 Cognitive Threat Analytics -- listen, it's existing 12:35:01
21 technology, and Cisco hopes that it will explode over time, 12:35:05
22 but right now, the use case, it is de minimus. And 12:35:10
23 Stealthwatch has been a product in the marketplace since 12:35:16
24 2005. That's where over 99 percent of the after-the-fact 12:35:19
25 analysis is being done. 12:35:24

1 THE COURT: Do you think that, if there had been a 12:35:25
2 negotiation, that the plaintiffs would have accepted total 12:35:30
3 damages of \$3 million? 12:35:36

4 MR. JAMESON: Well, Your Honor -- 12:35:39

5 THE COURT: 3,300,000, do you think they would have 12:35:41
6 accepted that? 12:35:47

7 MR. JAMESON: To respond to Mr. Andre's comment 12:35:47
8 about settlement offers and they were trying hard, there's 12:35:51
9 never been a settlement offer made in this case. So there's 12:35:55
10 never even been a real-world negotiation, much less a 12:35:57
11 hypothetical negotiation. 12:36:00

12 THE COURT: Do you think that, if you would have 12:36:01
13 offered that, that they would have accepted that? 12:36:01

14 MR. JAMESON: Your Honor, they should have. They 12:36:04
15 absolutely should have. And, Your Honor, the fact that 12:36:06
16 there's an order-of-magnitude difference between what 12:36:14
17 plaintiff is seeking and what Dr. Becker says is the right 12:36:17
18 measure of damages, it doesn't mean that Dr. Becker, in any 12:36:25
19 way, shape, or form, is anything other than 100 percent 12:36:28
20 correct, because if you look at each one of these patents, 12:36:32
21 look at the struggle that they had to get each patent issued 12:36:38
22 by the Patent Office, narrowing amendment after narrowing 12:36:42
23 amendment after narrowing amendment -- 12:36:48

24 THE COURT: That happens all the time. We all know 12:36:51
25 that, Mr. Jameson. 12:36:53

1	MR. JAMESON: Well, Your Honor --	12:36:54
2	THE COURT: How many patents are issued on the first	12:36:55
3	time?	12:36:57
4	MR. JAMESON: Your Honor, the problem --	12:37:00
5	THE COURT: I know a little bit more about it than	12:37:02
6	that.	12:37:06
7	MR. JAMESON: The prosecution history of these	12:37:06
8	patents is extensive, and the claims got longer and longer	12:37:08
9	and longer, and when a claim gets longer, the claim gets	12:37:11
10	narrower and narrower and narrower.	12:37:16
11	And the law in the Federal Circuit is crystal clear	12:37:19
12	that what we are trying to achieve in looking at damages is	12:37:26
13	what is the value of the patented improvement. And in each	12:37:32
14	one of these cases, the value proposition, if any, it is	12:37:37
15	de minimus, or minimal, based on what came before it, what	12:37:44
16	are the conventional components that are covered by the	12:37:48
17	claims, and that explains Dr. Becker's analysis.	12:37:52
18	This is -- and respectfully, Dr. Becker has done	12:37:58
19	exactly what I believe that the Federal Circuit expects	12:38:07
20	parties to do in trying to identify incremental value of the	12:38:10
21	patents.	12:38:15
22	THE COURT: All right. Well, I'll disregard your	12:38:16
23	statement that no settlement offer was made in the case,	12:38:18
24	because that's not admissible evidence. It's not in	12:38:24
25	evidence, and nobody has a right to argue that. So move on.	12:38:27

1 MR. JAMESON: Your Honor, with respect to injunctive 12:38:34
2 relief, today is the first that we've heard what they're 12:38:41
3 asking for by way of an injunction. I will note that in the 12:38:48
4 findings of facts, they've not made any findings of fact with 12:38:53
5 respect to injunctive relief. They've not attempted to meet 12:38:59
6 the four-factor test, and the idea that they believe that 12:39:02
7 somehow or another firewall technology should be enjoined at 12:39:09
8 some broad level, when Cisco has been offering firewalls in 12:39:13
9 the marketplace for two decades, is clearly overreaching. 12:39:17

10 And we provide you with some law on injunctive 12:39:23
11 relief; actually, some of it, I think it comes from Your 12:39:29
12 Honor. As you stated in the *BASF* case, "Injunctions are a 12:39:32
13 drastic and extraordinary remedy which should not be granted 12:39:38
14 as a matter of course." 12:39:42

15 There's obviously a huge public interest issue here, 12:39:43
16 and quite frankly, to your point about preventing cyber 12:39:48
17 threats, there is a huge interest in preventing cyber 12:39:53
18 threats, and Cisco is one of the best in the country at doing 12:39:58
19 that. So enjoining their firewall technology would be a huge 12:40:00
20 disservice to the public interest. 12:40:05

21 There is also not a presumption of irreparable harm 12:40:09
22 in a patent infringement case, and Centripetal has made no 12:40:13
23 showing of irreparable harm in this case. And, in fact, 12:40:17
24 they've made no showing of a causal nexus between any harm to 12:40:22
25 Centripetal in Cisco's alleged infringement. Instead, 12:40:27

1 they've just said, at a 100,000-foot level, that Centripetal 12:40:30
2 has not been as successful as they would like, and they blame 12:40:35
3 it on Cisco. 12:40:38

4 But the reality is Centripetal and Cisco are not 12:40:40
5 direct competitors. The direct competitors in the threat 12:40:45
6 intelligence gateway market was Keysight/Ixia. They sued 12:40:50
7 Keysight/Ixia, a direct competitor, and what did they do? 12:40:56
8 They licensed it. They took money. It goes to show that 12:41:01
9 money damages are available. The other direct competitors 12:41:05
10 are Looking Glass, Bandura, and Arbor Networks. Centripetal 12:41:09
11 has taken no action with respect to them. 12:41:14

12 The record in this case is crystal clear that 12:41:16
13 Centripetal believes that its threat intelligence gateway 12:41:19
14 product is complementary to Cisco's firewall technology. It 12:41:25
15 is not competitive, and in the slides that follow, we provide 12:41:31
16 you chapter and verse with that evidence. 12:41:34

17 I could skip over the routers and switches because 12:41:39
18 they're not seeking an injunction on that. 12:41:43

19 The other point that I would make in a big picture 12:41:45
20 is the U.S. Government is a huge customer of Cisco, and it's 12:41:48
21 not just for routers and switches, it's for network security, 12:41:54
22 it's for their firewall technology, as well; over a billion 12:41:57
23 dollars in sales that we sell to the U.S. Government. 12:42:00

24 THE COURT: The fact that they're not seeking an 12:42:03
25 injunction on routers and switches doesn't mean that the 12:42:07

1 Court would not award that remedy. The fact that they 12:42:12
2 haven't asked for it here, I have some reluctance about the 12:42:18
3 wisdom of, if I award damages, of awarding an injunction as 12:42:26
4 to one patent, or one accused product, and a running royalty 12:42:36
5 as to another. I'm not sure if that makes any sense. 12:42:46

6 MR. JAMESON: Well, respectfully -- 12:42:55

7 THE COURT: Of course, I can understand why the 12:42:58
8 plaintiff would ask for that, because if you look at the 12:43:01
9 numbers, the numbers on the sale of firewalls would not 12:43:04
10 result in much damages by way of a running royalty. That 12:43:14
11 would come from switches and routers. So I can understand 12:43:18
12 why they'd ask for that form of relief, but I'm not sure it 12:43:24
13 makes sense to me because, as I say, that would be the best 12:43:30
14 financial outcome, I would think, for Centripetal. 12:43:44

15 MR. JAMESON: Your Honor, Centripetal doesn't even 12:43:51
16 sell routers and switches. They can't fill a market demand 12:43:53
17 for routers and switches, and that's part of the test for an 12:44:00
18 injunction; who's going to fill the void? Centripetal 12:44:03
19 doesn't sell firewalls. Who's going to fill the void? 12:44:07
20 Centripetal sells a threat intelligence gateway that they 12:44:11
21 have admitted is not competitive with firewalls. 12:44:14

22 And this is really important. I need to show you 12:44:17
23 this testimony. This is Centripetal's document that was 12:44:21
24 created in May of 2018. This is after they've sued Cisco for 12:44:28
25 infringement. And you've seen this diagram; it's PTX-1132. 12:44:34

1 And it shows that their product is a complementary product. 12:44:39
2 It sits next to a firewall, and it sits next to a network 12:44:47
3 where you would find Stealthwatch and other routers and 12:44:51
4 switches and other appliances. 12:44:54

5 And this is what their own witnesses said about this 12:44:57
6 product in this trial: 12:45:01

7 Steve Rogers, the founder: "We designed our system 12:45:02
8 in such a way that you could leave the existing 12:45:07
9 infrastructure in place. We would leave what you got there 12:45:12
10 and put this new system in along with the things you already 12:45:16
11 had. It was a complementary product." 12:45:19

12 Another answer he gave: "Many of the banks and 12:45:24
13 others that we were talking to at the time had these things 12:45:28
14 in. They were required to have a firewall, a web proxy, and 12:45:31
15 an IPS. They were required to have it. They have to have -- 12:45:36
16 banks and other companies have to have all these technologies 12:45:41
17 to comply with regulations, so we couldn't go in and say, 12:45:45
18 well, you know, if you put our system in, you don't need 12:45:50
19 these things. So we worked in conjunction with them." 12:45:53

20 THE COURT: It's not a question of whether they need 12:45:56
21 a physical switch or a physical router. It's a question of 12:45:59
22 what is embedded in them. 12:46:04

23 MR. JAMESON: The point is Mr. Rogers was readily 12:46:11
24 acknowledging that they are a complementary product to 12:46:19
25 Cisco -- 12:46:24

1 THE COURT: That's right. That's right. The 12:46:25
2 physical switch or the physical firewall or the physical 12:46:27
3 router is not what they're selling, what they're selling is a 12:46:32
4 patented method of equipping those items with security 12:46:38
5 devices -- 12:46:48

6 MR. JAMESON: Your Honor -- 12:46:52

7 THE COURT: -- not the physical products. 12:46:54

8 MR. JAMESON: They're selling a product that sits 12:46:56
9 next to the firewalls that Mr. Andre -- 12:47:00

10 THE COURT: And in the middle of the network, 12:47:04
11 according to their evidence. It sits on both sides of the 12:47:07
12 firewall. 12:47:11

13 MR. JAMESON: Your Honor, this is their -- this is 12:47:15
14 their white paper. 12:47:18

15 THE COURT: Well, that's a gateway. That's one of 12:47:22
16 their products. That's not the whole range of what they're 12:47:23
17 selling. 12:47:26

18 MR. JAMESON: Your Honor, they only have one 12:47:28
19 product. You can either buy it as an appliance, or you can 12:47:32
20 buy it as a subscription. And I would ask that you read 12:47:34
21 PTX-1132 at 780 because they spell it out in spades at this 12:47:38
22 document right here as to where they fit in the marketplace. 12:47:43
23 And again, this is post-suing Cisco. 12:47:47

24 And Mr. Parnell, he provided similar testimony. "Do 12:47:55
25 you have an understanding of whether or not Centripetal's 12:48:02

1 products actually are intended to replace a firewall, router,
2 or switch?"

3 THE COURT: I understand that they're not. What
4 they do is, if the Court believes their evidence, they
5 improve the functionality of those items, they don't replace
6 them.

7 MR. JAMESON: Well, Your Honor, right now, I'm
8 talking about injunctive relief. That's what I'm talking
9 about. And when you are a complementary product, the fact
10 that you may improve something, that certainly would not be a
11 basis for an injunction.

12 THE COURT: Well, I can't enjoin you from selling
13 firewalls, routers, and switches; that's for sure. Obviously
14 not; I can't enjoin you from doing that. You've been selling
15 firewalls, routers, and switches. The question is what is
16 the functionality of your firewalls, routers, and switches?

17 MR. JAMESON: And, Your Honor, that gets back to my
18 point on damages. To the extent that there's any
19 improvements -- and I'm acting like there are, because we
20 obviously don't believe that there is, and so I just say that
21 for the record. We don't infringe on these patents. If we
22 do, then the patents are invalid.

23 But if you're trying to find the patented
24 improvement, if any, in these various patents, it's not in
25 the routers and the switches and the firewalls. It would be

1 in the management appliances that are working with those 12:49:49
2 devices, and that's the point that I was trying to make -- 12:49:55

3 THE COURT: Their case is that the functionality of 12:50:00
4 the firewalls, switches, and routers is improved. That's 12:50:08
5 their case. 12:50:14

6 MR. JAMESON: Based on technology -- 12:50:19

7 THE COURT: It's not that they build a better 12:50:22
8 switch, it's functionality. 12:50:25

9 MR. JAMESON: Based on technology that is pushed 12:50:33
10 down through the routers and the switches and the firewall 12:50:35
11 from the management appliances. That is the point I am 12:50:37
12 trying to make, that is, if you accept their arguments as 12:50:41
13 true. That is why they have all of these combinations at 12:50:45
14 issue in this case. 12:50:50

15 And even with respect to the '193 patent, despite 12:50:52
16 them saying we're only accusing the routers and the switches, 12:50:57
17 the evidence to prove up infringement had everything to do 12:51:00
18 with Stealthwatch and the source code and ISE and CTA, and 12:51:03
19 that's the point that I am trying to make. 12:51:13

20 Routers and switches and firewalls have been 12:51:17
21 blocking traffic, have been implementing rules, have been 12:51:22
22 rule swapping going back before the year 2010. 12:51:27

23 THE COURT: You've said that hundreds of times, 12:51:32
24 Mr. Jameson. What they are saying is that their patents 12:51:35
25 improve the functionality of those products. That's what 12:51:43

1 they're saying. 12:51:47

2 MR. JAMESON: We obviously disagree. 12:51:49

3 THE COURT: So I understand that they are not 12:51:51
4 selling routers, switches, and firewalls. They're selling a 12:51:56
5 way to improve their functionality, according to their case. 12:52:06
6 And, yes, it is in combination with other products, in most 12:52:14
7 cases at least. 12:52:24

8 MR. JAMESON: The other point that I wanted to 12:52:28
9 make -- and I'll wrap up, Your Honor -- is when you expand 12:52:30
10 past the threat intelligence gateway market, which is where 12:52:35
11 they have direct competition with -- 12:52:39

12 THE COURT: Yeah, I remember seeing that piece of 12:52:41
13 paper. 12:52:43

14 MR. JAMESON: This was actually a document that 12:52:44
15 Malackowski relied on during the trial. The threat 12:52:48
16 intelligence market in the cyber security market is huge, and 12:52:53
17 it's not just Cisco that is out there. I mean, there's 49 12:52:57
18 companies on this list, and then the document says it's only 12:53:01
19 exemplary, it's not complete. It is a huge market. 12:53:05

20 And Centripetal is -- to the extent that they say 12:53:10
21 they may be competing with Cisco, they're competing with 12:53:16
22 every single company in the cyber security market, as well, 12:53:19
23 every company that sells threat intelligence, and firewalls, 12:53:23
24 and anything that can help a company with network security. 12:53:28
25 And so it's not like this is a two-company market where we're 12:53:34

1 the only direct competitor of them; the evidence is far from
2 the contrary on that.

3 THE COURT: Well, your papers say that you're the
4 only company that can do this.

5 MR. JAMESON: We're the only company -- well, we're
6 certainly proud of the fact, Your Honor, that we are the --
7 we sell the best routers and switching technology in the
8 world, and we have for a long time, and we're proud of our
9 network security. We will not shy away from that.

10 THE COURT: I understand. And your technical
11 documents as well as your public documents say that you're
12 the only company that can do this.

13 MR. JAMESON: Your Honor, we certainly believe in
14 our products, but I will tell you, and I've provided you with
15 case law -- I provided you with case law in the liability
16 closing, but we know that a patent case is not about
17 marketing documents. It's about source code and technical
18 documents.

19 THE COURT: I said technical documents, Mr. Jameson.

20 MR. JAMESON: Your Honor, the final point that I
21 wanted to make was on kind of the public interest factor.

22 This is just a list of U.S. Government customers of
23 Cisco. What we provide to them from a cyber security
24 perspective is obviously critical at times. It is a matter
25 of national security. But it's not just the U.S. Government.

1 We sell our technology to hospitals and to schools. We sell
2 it to banks. We sell it to companies that manage financial
3 information, our personal financial information, and so there
4 is a huge public interest in making sure that the best
5 network security is available to them, and so the public
6 interest factor would weigh substantially against any
7 injunctive relief in this case.

8 And with that, Your Honor, absent any questions,
9 Your Honor, I will wrap up.

10 THE COURT: All right. Well, I have to wrap up
11 anyway, but I have a question for Mr. Andre to be thinking
12 about, and that is:

13 Mr. Andre, why should the Court, if it grants relief
14 in this case, grant injunctive relief as to firewalls and
15 grant you a running royalty as to routers and switches, or
16 intelligence management systems such as CTA, ETA, ISE? The
17 great volume of sales is in routers and switches.

18 And I've got a judge's meeting at 1:00, so we'll be
19 adjourned until 2:00. I'll give you a chance to answer that
20 question after lunch, and I'll give Mr. Jameson a chance to
21 respond to whatever your answer is, but I'm somewhat troubled
22 by the idea of granting one form of relief as to one accused
23 product and another as to a different accused product. I've
24 never done that before.

25 We'll be adjourned until 2:00.

1 (Recess from 12:57 p.m. to 2:02 p.m.) 01:55:12

2 THE COURT: All right, Mr. Andre, do you wish to 02:02:28
3 address the question the Court put to you? 02:02:33

4 MR. ANDRE: Sure, Your Honor. And the honest answer 02:02:36
5 is, Your Honor, we're just trying to be more pragmatic. We 02:02:40
6 would like to have an injunction against all the functions 02:02:43
7 that we're accusing of infringement and have them rip it out 02:02:47
8 of all their systems. That would be our preference. 02:02:51

9 We didn't want to try to ask the Court for more than 02:02:53
10 what we thought we could get because of the magnitude of that 02:02:57
11 request. We read all of Cisco's technical documents and 02:03:00
12 their public documents where they said this was the most 02:03:04
13 important technology since sliced bread, and we thought the 02:03:07
14 Court would be hesitant to rip it out, to be quite candid. 02:03:14

15 After hearing Mr. Jameson's closing argument today, 02:03:16
16 it doesn't seem that important to him at all. It sounds 02:03:18
17 pretty de minimus. So if we had our druthers, I think we 02:03:23
18 would prefer to get an injunction against all of the 02:03:26
19 technology in there. If they can rip out the technology from 02:03:29
20 the routers and switches and firewalls and sell the firewalls 02:03:31
21 and routers and switches without the technology, that would 02:03:37
22 be our preference. 02:03:39

23 THE COURT: Well, suppose the Court decided on a 02:03:42
24 running royalty. One of the pieces the Court would have to 02:03:48
25 face is that, in deciding what a running royalty is, with 02:03:53

1 Cisco's domination of the market, it's a lot easier for Cisco
2 to sell this technology than it is for your company to sell
3 it. So that would have to be reflected in any royalty rate.

4 I don't think that that's been recognized by your
5 experts, but that's something that occurs to the Court, that
6 Cisco, with its enormous domination of the market, has the
7 sales force and the repeat business that they've had for many
8 years, and it's easier for them to sell a new product than it
9 is for you or any other start-up company, and I haven't seen
10 that reflected in a consideration of the royalty rate.

11 MR. ANDRE: Your Honor, it wasn't addressed by our
12 experts in this case for the very reason that injunction
13 would be preferable.

14 With respect to the running royalty, what we did in
15 the Keysight agreement, we gave them three years to kind of
16 sunset their product; either find a new technology or take it
17 out. So we gave them a three-year license. And that was a
18 10 percent royalty rate on the competing products on gross
19 revenues, and we thought that was a fair royalty on gross
20 revenues. It wasn't apportioned in any way. And we thought
21 that was a fair royalty rate going forward for the three-year
22 period. So that's how we worked that out in that case.

23 What we were contemplating here is something along
24 the same lines for the running royalty, but --

25 THE COURT: You mean for a limited period of time?

1	MR. ANDRE: Well, it could go for as long as they	02:06:01
2	wanted if it's a running royalty, obviously, but we haven't	02:06:04
3	really thought about if they want to sunset it out.	02:06:07
4	When we came to an agreement with Keysight, it was	02:06:09
5	that at three years they would make a determination whether	02:06:12
6	they want to go back and try to negotiate another license	02:06:14
7	agreement, or they'd have the technology out of their	02:06:18
8	products. We don't know what they're going to do, of course,	02:06:20
9	if they think they can find a non-infringing alternative or a	02:06:23
10	design-around or if they're going to rip the technology out.	02:06:29
11	The world changes very quickly.	02:06:30
12	THE COURT: Well, all Cisco has to do is come at it	02:06:32
13	with a new set of routers and switches that they call the	02:06:40
14	1100 series and say that they're entirely different.	02:06:44
15	MR. ANDRE: Yeah.	02:06:45
16	THE COURT: Then they could avoid paying any	02:06:47
17	royalty. I mean, litigation costs are not a factor to Cisco.	02:06:49
18	MR. ANDRE: Right. And that is a little bit of the	02:06:56
19	name game. As counsel referred to earlier in this case, we	02:06:58
20	are actually in the middle of an arbitration with Keysight on	02:07:02
21	that very issue. They changed the name, and we think they	02:07:07
22	should pay royalties on that change of name, so that is an	02:07:12
23	issue --	02:07:15
24	THE COURT: Well, that's already happened in this	02:07:16
25	case.	02:07:18

1 MR. ANDRE: Yeah. 02:07:18

2 THE COURT: It wouldn't be surprising to see it 02:07:20
3 happen again. 02:07:23

4 MR. ANDRE: Yeah. It's not an easy answer how -- 02:07:25

5 THE COURT: Well, as the Federal Circuit recognizes, 02:07:31
6 there are no easy answers in fixing appropriate damages in a 02:07:37
7 patent case. There just aren't any easy answers. 02:07:42

8 MR. ANDRE: That's an absolute truth, Your Honor. 02:07:46
9 We deal with this in every case. 02:07:49

10 A few years back, I got an injunction against a 02:07:53
11 party, and they said they changed their -- that they took it 02:07:56
12 out of their product, and we didn't think they did, and then 02:07:58
13 we had a contempt issue come up. 02:08:01

14 So I think this is a tricky area with damages and 02:08:05
15 with injunction, and there's no easy answers. The Federal 02:08:07
16 Circuit has been wildly divergent on how they see things, 02:08:10
17 depending on the panel you get, and we've experienced that 02:08:15
18 firsthand, and we've noticed it in the other case law, as 02:08:18
19 well. 02:08:20

20 I think most of the judges and juries struggle with 02:08:21
21 this, as do the attorneys presenting it. We do our best, and 02:08:25
22 we try, like in this case, with a royalty rate, we use -- in 02:08:29
23 the case I argued to the Federal Circuit, I know how that 02:08:33
24 came down, and it's the same with the apportionment. But 02:08:36
25 like I said, if we had our druthers and all things being 02:08:38

1 equal, we'd like to have the technology -- 02:08:43

2 THE COURT: Well, 10 percent of the sales of routers 02:08:45
3 and switches would be an enormous amount of money. 02:08:54

4 MR. ANDRE: We're hoping for the 5 percent number, 02:09:03
5 Your Honor, because that would be -- with Keysight, we did 02:09:05
6 5 percent for the non-competing products and 10 percent for 02:09:07
7 the competing products. So we're looking at 5 percent for 02:09:10
8 that. 02:09:13

9 THE COURT: These are competing products, aren't 02:09:13
10 they? 02:09:15

11 MR. ANDRE: Well, the technology is competing, but 02:09:16
12 as Mr. Jameson said, we don't sell routers and switches. 02:09:18

13 THE COURT: Well, how do I -- if I granted an 02:09:23
14 injunction, I'd just have to say that they had to remove the 02:09:26
15 technology from the accused products, which include routers, 02:09:33
16 switches, firewalls, operating systems, Stealthwatch, ETA, 02:09:38
17 CTA. So, as you say, that would be quite an impact, taking 02:09:48
18 your side of the case. Taking their side of the case, it 02:10:06
19 would be a minimal impact. 02:10:09

20 MR. ANDRE: Well, that was what we believed is -- we 02:10:10
21 hear them saying it's de minimus. It sounds like they would 02:10:15
22 have no issue just ripping it out and going about their 02:10:18
23 business, but we -- I mean, to be candid with you, once 02:10:22
24 again, we think that's litigation posturing, and we think 02:10:24
25 this is extremely important technology. 02:10:28

1 We think it changed the networking industry in 2017
2 when they launched it. We're watching the market respond to
3 it. We're watching other major players who are their same
4 magnitude of size. Keysight was like 5 percent the size of
5 Cisco, and so they're a small player, as well, but we're
6 seeing these big players that are Cisco's competitors, and
7 we're seeing them now come into the same space competing with
8 Cisco.

9 So we think it's immensely important technology, and
10 we would love to be in the position to hold the keys to that
11 with injunctive relief, if we could. That's the reason we
12 split it the way we did, with the running royalty and the
13 injunction just for the firewalls, because there are
14 literally tons of firewall manufacturers.

15 I think Cisco probably has less than 10 percent of
16 the firewall market, but for the routers and switches, they
17 have 80 percent of that market. So that's the reason we
18 split it up the way we did, just from a pure pragmatic point
19 of view, but there's not a legal theory there that I can
20 point to that would say you should enjoin one and a running
21 royalty on the other.

22 THE COURT: All right.

23 Mr. Jameson, do you care to respond?

24 MR. JAMESON: Yes, I do, Your Honor. I think in
25 response, Your Honor, to the question that you posed before

1 lunch, is that, under the Supreme Court's *eBay v.*

02:12:00

2 *MercExchange* decision, that plaintiff clearly has the burden

02:12:07

3 to show injunctive relief, and if they were able to --

02:12:10

4 THE COURT: Well, I mean, if I accept your argument

02:12:15

5 about the value of this technology, it would be de minimus to

02:12:17

6 remove it from your products. You state that this technology

02:12:25

7 makes virtually no difference to your technology. So why

02:12:33

8 shouldn't I order you to remove it, if it's so de minimus?

02:12:38

9 MR. JAMESON: Respectfully, Your Honor, the reason

02:12:42

10 why you shouldn't order us to remove it would -- again, we

02:12:44

11 now have to assume infringement and patent validity. But

02:12:47

12 it's because plaintiff hasn't satisfied their burden.

02:12:50

13 And the law under *eBay*, as you followed in the *BASF*

02:12:53

14 *vs. Commonwealth* case, is -- the law is crystal clear; is

02:13:01

15 that a permanent injunction is an extraordinary remedy and

02:13:04

16 that the plaintiff has to establish the four-factor test, and

02:13:07

17 they would have to do it for any product or product

02:13:10

18 combination that they're seeking an injunction on, and they

02:13:14

19 would have to show irreparable harm, no adequate remedies at

02:13:18

20 law, hardship balance in their favor, and that an injunction

02:13:25

21 doesn't serve the public interest.

02:13:30

22 And with respect to any part of that combination in

02:13:32

23 this case, they've not made that showing in any way, shape,

02:13:34

24 or form. If, hypothetically, they had shown it with respect

02:13:39

25 to a particular product combination but not another product

02:13:44

1 combination, there's no reason, that I'm aware of under the
2 law, that you couldn't issue an injunction with respect to a
3 narrow product combination but not others.

4 But what we know from the evidence in this case is
5 that they simply have not made that showing, period, with
6 respect to any of the accused products, and it is absolutely
7 100 percent their burden, and if there's ever a case where
8 money damages can satisfy what Centripetal is looking for,
9 it's actually this one.

10 I mean, they took money damages in the Keysight
11 litigation, and that was a direct competitor. We are not a
12 direct competitor, and they've acknowledged that we're not a
13 direct competitor, and so --

14 THE COURT: I don't think they've acknowledged that
15 you're not a direct competitor.

16 MR. JAMESON: Well, I don't think there's any
17 evidence in this record --

18 THE COURT: I mean, you can say that the evidence
19 doesn't prove that, but I don't think they've acknowledged
20 that.

21 MR. JAMESON: Your Honor, that was the point I was
22 getting ready to make, is that there's no evidence in this
23 case that is going to establish that we're a direct
24 competitor of theirs.

25 THE COURT: Well, your technical documents say, and

1 your own witnesses, if I accept their view, contradict your
2 own experts; I mean, blatantly, if I accept their viewpoint.

3 And I don't think, given the history of this case
4 and the DNA -- what was it? -- NDA, the nondisclosure
5 agreement -- there's so many initials in this case, I can't
6 keep them all straight -- that anybody would ever say that,
7 if you did infringe these products, that you did it
8 accidentally.

9 The relationship between the parties is such that,
10 if the Court found that you infringed, given the conducts and
11 meetings and the similarity of the technology, to say that
12 you infringed accidentally would be a very unlikely outcome.

13 MR. JAMESON: Well, Your Honor, I will respectfully
14 disagree that the evidence gets anywhere close to supporting
15 that theory. We put on witness after witness after witness
16 that demonstrated our independent creation of every single
17 one of the products that are at issue.

18 THE COURT: I know. I know. And your witnesses
19 said that the products -- your experts said that the products
20 didn't do what your employees said it did do.

21 MR. JAMESON: And I would respectfully disagree with
22 that as well.

23 THE COURT: I think you do.

24 MR. JAMESON: With respect to your question on
25 injunctive relief, they have not satisfied the burden, and it

1 is their burden. You could hypothetically try to figure out 02:17:44
2 how to tailor a narrow injunction with respect to a segment 02:17:48
3 of products if they had satisfied their burden, but they 02:17:55
4 haven't, and I think that was the question that you posed 02:17:58
5 before lunch. 02:18:01

6 I do believe, in the event that you were to find 02:18:04
7 infringement and validity of a patent, that some kind of 02:18:08
8 monetary damages on a go-forward basis could be fashioned. 02:18:13
9 Mr. Andre mentioned a sunset provision. If, in fact, you 02:18:20
10 were to find infringement and validity of a patent, I think 02:18:24
11 that approach would make sense in this case in lieu of 02:18:30
12 injunctive relief that they have not proven. 02:18:36

13 And I think the final point that I will make is 02:18:40
14 that, if an injunction were granted, it is going to result in 02:18:44
15 satellite litigation. That's just -- it's just going to 02:18:54
16 happen, because we certainly would make the effort to design 02:18:58
17 around, and I expect Centripetal is going to tell us that we 02:19:03
18 haven't done the right thing, and we're going to find ourself 02:19:07
19 right back in front of you or someone else in the Eastern 02:19:12
20 District of Virginia in fairly short order. 02:19:16

21 THE COURT: Well, if I award damages, you'll come 02:19:19
22 back and say that you have designed around it, anyway, and so 02:19:22
23 you don't owe a royalty, and they would say that you did. 02:19:31
24 These cases never end. So that is just as likely a 02:19:34
25 possibility as a suit over the injunction, so there's not 02:19:39

1 much of a choice there. 02:19:50

2 MR. JAMESON: Well, Your Honor, I think I've given 02:19:52
3 you our perspective on your question. 02:19:54

4 THE COURT: I think you have. I think you have, 02:19:57
5 Mr. Jameson. I think you have. And I'm not saying that 02:20:00
6 you're not right about that. I think it's just very 02:20:04
7 difficult to come up with the right answer if a court decides 02:20:15
8 the damages. Everybody recognizes that. 02:20:20

9 And I recognize that both parties lose when they 02:20:25
10 spend their resources litigating instead of cooperating. And 02:20:34
11 the country loses when it's a very important technology like 02:20:45
12 this. So everybody loses all around when we have ongoing 02:20:49
13 litigation. In other countries, people in the same business 02:20:58
14 seem to cooperate more than they do in this country, and that 02:21:03
15 is unfortunate. 02:21:11

16 Historically, Cisco's found a way to cooperate with 02:21:17
17 other people. They've licensed products. I was surprised 02:21:21
18 that you found no comparable license because you have -- you 02:21:26
19 licensed one of the products in this case for years before 02:21:31
20 you bought the company. 02:21:34

21 MR. JAMESON: Dr. Becker addressed that issue during 02:21:43
22 his direct examination. 02:21:45

23 THE COURT: Right. Well, we've been going through 02:21:48
24 the record as best we can, and we'll continue to do so, 02:22:07
25 including what you have submitted on damages, if we get to 02:22:12

1 that point. 02:22:22

2 Is there anything further that either side wants to 02:22:36
3 bring to the Court's attention? 02:22:40

4 MR. ANDRE: Nothing from Centripetal, Your Honor. 02:22:42
5 Thank you. Appreciate it. 02:22:44

6 MR. JAMESON: Your Honor, absent your having some 02:22:46
7 burning question that I have failed to at least give an 02:22:49
8 answer to, nothing further. 02:22:52

9 THE COURT: No. I think you've tried to answer all 02:22:54
10 my questions as best you can. 02:22:58

11 MR. JAMESON: Thank you, Your Honor. 02:23:02

12 THE COURT: So we'll be adjourned. 02:23:03

13 MR. ANDRE: Thank you, Your Honor. Have a good 02:23:05
14 weekend. 02:23:07

15 (Proceedings adjourned at 2:23 p.m.) 02:23:08

16

17 CERTIFICATION

18

19 I certify that the foregoing is a correct transcript
20 from the record of proceedings in the above-entitled matter.

21

22

23 _____/s/_____

24 Carol L. Naughton

25 June 26, 2020